

United STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

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UNITED STATES OF AMERICA	:	
	:	
-vs-	:	Case No. 1:09-cr-179
	:	
	:	
MIRWAIS MOHAMADI,	:	
Defendant.	:	
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MOTIONS HEARING

March 5, 2010

Before: Liam O'Grady, Judge

APPEARANCES:

Ronald L. Walutes, Jr. and Michael P. Ben'Ary,
Counsel for the United States

Michael S. Nachmanoff, Whitney E.C. Minter and
Jeffrey C. Corey, Counsel for the Defendant

The Defendant, M. Mohamadi, in person

1 THE CLERK: Criminal case number 1:09-cr-179, the
2 United States of America versus Mirwais Mohamadi.

3 MR. WALUTES: Good morning, Your Honor. Ronald
4 Walutes and Mike Ben'Ary for the United States.

5 THE COURT: Good morning.

6 MR. NACHMANOFF: Good morning, Your Honor. Michael
7 Nachmanoff for Mr. Mohamadi, with Whitney Minter and Jeff
8 Corey.

9 THE COURT: All right, good morning to you all.
10 Good morning, Mr. Mohamadi.

11 THE DEFENDANT: Good morning, Your Honor.

12 THE COURT: This comes on for a series of motions,
13 some of them recently filed, 404(b) motions, and also Mr.
14 Mohamadi's motions that he requested permission to file. And
15 I granted that permission and they were filed the end of last
16 week for hearing today. And the Government has responded to
17 those motions.

18 I don't know who is going to argue what motions, Mr.
19 Nachmanoff.

20 MR. NACHMANOFF: Your Honor, if I can propose a way
21 of doing it. Whatever is most convenient for the Court.

22 There is the motion in limine to exclude the
23 evidence surrounding the gun, that's the June 12 incident that
24 occurred in Washington, D.C. And if we could address that
25 first, Ms. Minter was going to argue that.

1 If we could then turn to the transcripts and
2 recordings and how to address that under both 404(b) and 403.
3 Mr. Corey was going to address that.

4 And then if we could turn to the pro se matters at
5 the end, if the Court is willing to do that. There are a
6 number of things that I know Mr. Mohamadi wants to address and
7 that he asked me to address on his behalf as well.

8 THE COURT: I think that's a good way to proceed.

9 MS. MINTER: Good morning, Your Honor.

10 We are asking the Court to exclude the evidence that
11 is described by the Government in their motion to admit
12 evidence pursuant to 404(b). In short, the Government is
13 arguing that because Mr. Mohamadi is alleged to have possessed
14 a .380 handgun on the 12th of June 2007, that it means that he
15 possessed a handgun on May 26 and 27th of 2007.

16 And that is precisely the concept that other bad
17 acts evidence seeks to exclude. One bad act on a particular
18 day, inviting the jury to assume that that person committed
19 that same or similar or any bad act on another day,
20 specifically the date of the offenses in the indictment.

21 This alleged possession of this .380 in Washington,
22 D.C. took place over two weeks after the date of the offense.
23 And as we acknowledged in our position, that does not
24 necessarily mean that something is excluded for purposes of
25 404(b), but it certainly cuts substantially against any

1 argument that can be made with regard to leaning toward
2 intent, knowledge, motive, all of the other things that 404(b)
3 lists. Because, of course, other bad acts evidence is not
4 admissible if it only goes to show that somebody committed a
5 prior bad act earlier. And that's exactly what this is, or in
6 this case later.

7 THE COURT: Well, the argument I think we'll hear is
8 that Mr. Mohamadi allegedly used the gun on the 26th and 27th.
9 That the gun wasn't recovered. The gun was described. And
10 that two weeks later a gun meeting the same description, there
11 is another witness who says he saw a gun in Mr. Mohamadi's
12 possession two weeks later which meets the description.

13 And, therefore, it corroborates an element of
14 several of the charges, which is that he possessed a firearm.
15 Which is part of their burden to convince the jury beyond a
16 reasonable doubt that they, that he did possess the firearm,
17 and that it's really intrinsic to the crime. And if not, then
18 it is certainly relevant to prove knowledge, intent.

19 I think the Government may refine that further, but
20 I think that's where they are headed.

21 So, tell me why it isn't relevant to an element of
22 the, proof of an element of the offense?

23 MS. MINTER: Well, to begin, Your Honor, to the
24 extent that-- The Government has not put forth an argument
25 that it is intrinsic. Their argument has been that it is

1 extrinsic and it is admissible under 404(b).

2 To the extent that it could be viewed as intrinsic
3 in that it is not there to prove one of the factors listed in
4 404(b), but rather to prove an element of the offense, it does
5 not provide any illumination toward the element of that
6 offense. It does not show that Mr. Mohamadi possessed a
7 firearm on the 26th and 27th.

8 It shows, assuming the Government can prove what
9 they allege in their 404(b) notice, it shows that he possessed
10 a firearm on the 12th of June. It shows nothing about what he
11 did on the 26th or 27th except to show that because he is a
12 bad guy who possessed it on the 12th, he is more like to have
13 possession it on the 26th and 27th.

14 Which is precisely what over bad acts rules and case
15 law attempt to avoid, the inference that because he did
16 something bad on one day, he has done something bad on the
17 date of the offense.

18 With respect to the issue that the Court raises with
19 the descriptions, under 404(b) the Fourth Circuit has said in
20 the Van Metre case that there are three things that the
21 Government needs to show before this evidence can be used
22 against Mr. Mohamadi. The first is that it is relevant and
23 not character evidence.

24 And as we said, because these are wholly unrelated
25 incidents, this is not someone describing an individual

1 running from the scene of a robbery on the 26th and 27th
2 holding a firearm, this is something completely attenuated.

3 But the second element is that it is necessary. And
4 the Van Metre case addresses the issue of necessity. And
5 quite frankly, in this case it is the furthest thing from
6 necessary.

7 The Government, according to their discovery and
8 Jencks and Giglio material and their arguments in this case
9 thus far, have two witnesses, each of which will testify, as
10 we expect, that they saw Mr. Mohamadi holding a firearm.

11 That is the single best way to prove possession.
12 Anything else is simply bootstrapping.

13 And there are certainly plenty of cases that talk
14 about 404(b) evidence, but the bulk of those talk about things
15 such as motive or intent, obtuse concepts that require sort of
16 a piecemeal of evidence to show what the defendant might have
17 thought or intended on a particular day.

18 This is not the same thing. The Government has put
19 forth that they are offering this evidence to show possession,
20 and they by their own explanation can prove possession through
21 the testimony of the witnesses. We don't have to wonder down
22 the path of a two-week later incident involving other people,
23 involving a completely unrelated incident. They by--

24 THE COURT: I am sure if they weren't concerned
25 about the cross-examination of those two witnesses, and one of

1 whom, of course, has a lot of baggage and the other is a
2 foreign national, that they might be satisfied with the direct
3 evidence that they have, but aren't they allowed to also
4 support that and corroborate it through what still might be
5 necessary evidence?

6 MS. MINTER: Well, Your Honor, the Van Metre case
7 looks at that exactly and whether evidence is necessary. And
8 in that case they said that it was necessary because they
9 needed to piece together this other evidence. They didn't
10 have the sort of direct evidence that we have in this case.

11 But with respect to the last issue that the Court
12 raised, and I apologize for my detour, but the reliability--
13 And this is sort of an interesting case because the
14 reliability at question here, I would submit, is not so much
15 the description of the firearm from the June 12 incident, but
16 rather it is the admissibility, or, excuse me, the reliability
17 of the previous description from Kimberly Riley.

18 The Government repeatedly describes it as a small
19 firearm. Ms. Riley, although she says it is .380, she
20 describes it as a long weapon. And she also describes in one
21 of the interviews with police, as she is describing it she has
22 difficulty describing the word "revolver" and describing
23 various guns.

24 I would submit that Ms. Riley's description is
25 certainly questionable. And so, for us to say that just

1 because she said .380 and a .380 was at some point in time
2 recovered, is a difficult match to make because Ms. Riley's
3 description could be whole-heartedly wrong. For example, if
4 Ms. Riley had said it was a knife, certainly the Government
5 would have no argument that a firearm from another incident
6 was relevant.

7 So, to say a .380 and a .380, that's one argument.
8 But when you look at the fact that Ms. Riley's description
9 doesn't hold up one end of the evidence that we're trying to
10 match up here, it becomes very difficult to say, well, this is
11 the same gun that we saw in both incidents.

12 But I would direct the Court to the D.C. Court of
13 Appeals opinion that we discussed which, again, goes into I
14 think a fairly good analysis of what we need to look at to
15 determine whether this is 404(b) evidence when we are talking
16 good a gun that shows up in a completely unrelated incident.

17 And again, it talks about knowledge and intent and
18 the difficulties that the Government faces in trying to say
19 that because someone had a firearm on another instance, it
20 reflects on what they thought or what they knew on a different
21 date.

22 The biggest problem that the Government has is they
23 are seeking to introduce this evidence to prove possession.
24 And possession on one day does not equal possession on another
25 day. It doesn't reflect on someone's inner workings, if you

1 will, the way knowledge and intent and motive and some of
2 these other things do.

3 Your Honor, I will tell the Court, at this point we
4 are proceeding based on the Government's position paper that
5 the threats, alleged threats to the dancer from Camelot on
6 June 12 are not on the table at this point. Certainly those
7 are relevant to nothing and highly prejudicial. But we are
8 proceeding on the assumption that the Government is not
9 putting those forward at this time in their case in chief.

10 The Government as outlined in their notice describes
11 intent as a large basis for why they are seeking to introduce
12 this evidence, but possession on June 12 gives us nothing with
13 regard to intent on the 26th and 27th.

14 And with regard to the things that the Government
15 needs to prove regarding intent, that Mr. Mohamadi intended to
16 rob these individuals, that he intended to use a firearm in
17 the course of those robberies, none of that is illuminated by
18 what happened on June 12. This is not a question of an
19 individual saying there was a firearm, but it was the person
20 next to me who possessed it. These are the sort of issues
21 that are addressed in the case law. That is not the case here
22 whatsoever.

23 And the Government gains nothing, other than
24 maligning Mr. Mohamadi's character, by introducing these other
25 bad acts. It does not reflect on what was going on in the

1 inner workings of his mind on the 26th and 27th.

2 Finally, Your Honor, I would point out to the Court
3 that certainly many of the facts of this case have come to
4 light at the last minute given our late appointment to this
5 case.

6 The Government did indeed file this motion two weeks
7 before trial, but that is two weeks in a very, very long time
8 period that they have investigated this case. And given the
9 difficulties that we have had investigating the case, we have
10 quite successfully looked into a number of matters, but that
11 is very much compounded when the notice that the Government
12 gives us has all of the identifying names and information
13 redacted out of the police reports. We have no idea who these
14 witnesses are, no idea who these people may be. We have no
15 opportunity to interview them.

16 If this is going to become a trial within a trial,
17 which we certainly submit it should not, but if it is, we are
18 wholly unprepared to defend against these accusations because
19 we don't know who those individuals are. And we have asked
20 the Government to provide that identifying information, and it
21 has not been provided for us.

22 Finally, Your Honor, with respect to the specific
23 information provided in the 404(b) notice, we would submit
24 that, as we indicated, at most the Government argues that the
25 possession of the gun on June 12 has an illuminating reason

1 for the trial regarding the incidents on the 26th and 27th.
2 There is nothing that can be said to make the incidents
3 surrounding that possession on June 12 relevant. The incident
4 involving the cab driver, the window to the cab, the other
5 comments that may have been made. And we would certainly ask
6 the Court to find that those are inadmissible.

7 THE COURT: All right, thank you.

8 Mr. Walutes.

9 MR. WALUTES: Your Honor, it's hard to imagine the
10 prejudice to the defense when, had they tried this case in
11 June of 2009, the Government would not have possessed the gun.

12 As to the availability of the witnesses, the notice
13 itself, Your Honor, filed, as defense counsel just noted, back
14 in February, identifies the employment and role of the witness
15 the Government intends to call.

16 THE COURT: Slow down and speak a little louder,
17 please.

18 MR. WALUTES: I'm sorry. The witness is identified
19 by employment in the Government's own notice, Your Honor,
20 filed back last month. The person knows the defendant for two
21 years in his role as security for Ozio's Nightclub.

22 The defendant has been moved, I am not sure if the
23 Court is aware of this, but he has now been moved permanently
24 to Alexandria to allow rapid working with his counsel.

25 So, the defense counsel could ask their client.

1 They don't need to ask the Government. When they asked me the
2 question, I gave that response. To repeat it to the Court
3 today without explaining why the defendant is not the source,
4 I think makes that, frankly, a hollow argument.

5 The only thing I would say, Your Honor, I think the
6 Court--

7 THE COURT: Then why not provide the name of the
8 witness? It's now four days, five days before trial.

9 MR. WALUTES: The witnesses, particularly the
10 stripper, is terrified of this defendant. He threatened to
11 shoot her in the head.

12 Frankly, Your Honor, the Government's generous offer
13 for a number of reasons, not to put that into this case, is
14 because, frankly, she is very scared.

15 THE DEFENDANT: Well, she is lying.

16 THE COURT: Okay.

17 THE DEFENDANT: I'm sorry.

18 THE COURT: Okay.

19 MR. WALUTES: Your Honor, I would say on the record
20 of this case there is--

21 THE COURT: No, I am talking about the security
22 official. Who would you-- I am not going to allow in the
23 extraneous stuff, the breaking the window on the taxicab and
24 the comments made. I am focused on the possession of the
25 weapon and its admissibility.

1 So, if you get that preliminary ruling from me,
2 which I am not going to change my mind about, then how many
3 witnesses do you need to prove that part?

4 MR. WALUTES: Two witnesses, Your Honor. Police
5 Officer Holly Paige from the D.C. mobile crime, I think her
6 name is not redacted in any of the police officer reports.

7 THE COURT: Who recovered the weapon.

8 MR. WALUTES: Recovered and processed the weapon,
9 Your Honor. And the second is the security guard from Ozio's
10 who has known the defendant for a couple years.

11 THE COURT: All right.

12 MR. WALUTES: Obviously, Your Honor, when I say a
13 couple years, I mean a couple years prior to 2007. The
14 defendant has subsequently been locked up and the witness has
15 had no contact with him.

16 THE COURT: Since that time?

17 MR. WALUTES: Correct.

18 THE COURT: All right. And he knows who the
19 security guard is and has known him for a period of--

20 MR. WALUTES: I believe that to be true, Your Honor.
21 He said that the two of them used to greet all the time. He
22 would try to get free drinks. He said before this day they
23 had a very amicable relationship. That the defendant was
24 frequently at Ozio's, at least once a week, and that they all
25 greeted each other.

1 In fact, that day they had a very amicable
2 relationship. And even when he was being ejected from the
3 establishment, the guard was trying to explain it in a very
4 amicable way to the defendant.

5 THE COURT: And is there--

6 MR. WALUTES: And, Your Honor, frankly, if Mr.
7 Nachmanoff calls me and he can't get the answer that way, I
8 will give it to him. I understand the point the Court is
9 making.

10 THE COURT: All right. Speak to your counsel, Mr.
11 Mohamadi.

12 Is there Jencks material involving this witness or
13 not?

14 MR. WALUTES: No. The 911 call, Your Honor, that
15 was given to defense counsel a couple weeks ago.

16 THE COURT: There was a 911-

17 MR. WALUTES: The 911 call that he places.

18 The only other point I would make, Your Honor, is
19 the Court has actually seen the videotaped interviews of KR,
20 Kimberly Riley. So, the Court knows that the .380 is being
21 used by her. I think the Court has a very clear understanding
22 of that point. We agree with the Court that it is
23 corroboration.

24 The last point I would make, Your Honor, is that it
25 is the weapon. It is not a weapon, as Ms. Minter keeps

1 saying, this is the weapon.

2 When the defendant is talking about having had a
3 .380 to inmate number 3 on the recorded tapes, he doesn't say,
4 I had two .380s. He says, I had a .380. And this is it.

5 THE COURT: So, your argument in response to the Van
6 Metre and Linares case is what?

7 MR. WALUTES: Is that this is the weapon, Your
8 Honor. It is relevant. The fact that he has it, as I say,
9 two weeks, I frankly think that to be an amazingly close
10 period of time. That he is possessing it on his person shows
11 that he had access to it and used it.

12 So, it goes to Counts 1 through 5, but it also
13 corroborates both victims, the taxicab driver and Kimberly
14 Riley. Kimberly Riley is describing it as a .380, and it is a
15 .380. And the taxicab driver characterizes it as a small,
16 black firearm. And it is a small, black firearm.

17 Your Honor, I think it goes both-- And as the Court
18 noted, I don't believe that there is any expectation that they
19 will be waiving cross-examination of either of the victims in
20 this case. Both will be appearing, they are both under
21 subpoena, and the Government is entitled to those two
22 corroborators.

23 I think the defendant's pro se motions serve wisely
24 to remind everyone that he is contesting all points.

25 THE COURT: All right. Thank you.

1 Ms. Minter.

2 MS. MINTER: Just very briefly, Your Honor. With
3 respect to, I already explained to the Court our concerns
4 about the lack of reliability with Ms. Riley's description of
5 the firearm.

6 And Mr. Haile, the cab driver, gave a description
7 perhaps of a small, black firearm, but he then upon further
8 inquiries from law enforcement officials isn't able to specify
9 if it's a revolver or a semiautomatic after being shown
10 pictures.

11 Again, we have a situation where essentially this
12 evidence will come in to say that gun looks like the gun that
13 I saw. Not that gun is the gun. And the Government asserts
14 this is the gun. But we have no evidence, we have no reason
15 to believe that.

16 What we have is this gun on June 12 looks like this
17 gun from May 26 and 27th. And again, that goes to the
18 reliability. But assuming for the moment that the Government
19 could prove that it was the exact same description, they still
20 have the difficulty of proving that possession on the 12th of
21 June equates to possession on May 26 and 27th. And they can't
22 do that. It's an improper use of the evidence to say that
23 this gun looks like the gun that I saw.

24 If the Government wants to introduce the firearm as
25 a demonstrative, that's one thing. To introduce it as this is

1 the firearm that was later recovered from Mr. Mohamadi's
2 possession, that's an entirely different thing. We would
3 submit that is improper. We would ask the Court to exclude
4 the evidence of the firearm as well.

5 THE COURT: All right. Well, I need to look a
6 little bit further on some cases regarding the recency, the
7 two-week period.

8 But I have reviewed the videotape of victim number
9 1, and I will do so again, but I think her description of the
10 weapon and her apparent sophistication with weapons is
11 apparent.

12 Now, it may turn out that the testimony at trial
13 comes in differently, and certainly the admissibility of
14 404(b) evidence is not made firmly before the trial because
15 the facts of the case may not come in the way the parties
16 predict.

17 So, I am going to look a little bit more at some
18 recent possession cases and as they involve the facts of this
19 case, and I will get you a decision this afternoon or first
20 thing Monday morning.

21 But the most that is coming in in this portion of
22 the case is possession of the weapon on the 12th. None of the
23 extraneous acts, which I find are unnecessarily prejudicial
24 without being probative, sufficiently probative.

25 So, all right, let's move on to the transcripts.

1 MR. COREY: Good morning, Your Honor. This motion
2 relates to the recordings the Government intends to admit.

3 The Government intends to admit evidence, many hours
4 of recordings, as Your Honor is aware. Now, these recordings
5 relate to Mr. Mohamadi's conversations with a Government
6 informant, Mr. Richard Bryan. And also recordings of Mr.
7 Mohamadi's phone calls to an individual named Dominik Brown.
8 In our motion we have identified a very small portion of those
9 recordings that we believe should be excluded under Rules
10 404(b), 403 and 402.

11 Now, the Government's position seems to be that all
12 of these recordings are admissible as intrinsic evidence. For
13 example, the Government claims that Mr. Mohamadi had
14 conversations, that his conversations with Mr. Bryan were part
15 of a carefully orchestrated scheme to convince him to commit
16 murder. Now they are saying every single one of those
17 conversations was part of the scheme.

18 The reality, Your Honor, is that the transcripts
19 show that Mr. Mohamadi and Mr. Bryan had many, many different
20 conversations, sometimes at various different points in the
21 jail. And these conversations are just simply not one giant
22 scheme. It's just not credible to claim that they are
23 inextricably intertwined.

24 And I think the case law points this out. For
25 example, United States versus Chin. In that case the

1 defendant sold heroin and made statements in the middle of a
2 drug deal that he had killed people in the past. And the
3 Fourth Circuit held that that statement, that in that context
4 killing was an integral part of the defendant's criminal
5 enterprise.

6 Here, Your Honor, though the Government is
7 overreaching, they are trying to get statements in of things
8 like conversations Mr. Mohamadi had about individuals having
9 sex change operations and statements Mr. Mohamadi made about
10 selling drugs in the past. Drugs, of course, are not at issue
11 in this case. We submit that's clearly Rule 404(b) evidence
12 and should be excluded on those grounds.

13 Similarly, comments about Mr. Mohamadi's efforts to
14 obtain counsel, it's just certainly not relevant. It's not
15 intrinsic evidence of anything. And the Government claims,
16 Your Honor, in its motion that Mr. Mohamadi discussed the need
17 to fire an attorney because his attorney would not participate
18 in obstructing justice for witness tampering. That's just
19 simply false, that's not what the transcripts say. As you
20 will see from the transcripts, Mr. Mohamadi complains in the
21 portions that we have cited about costs associated with his
22 lawyer and his lawyer not returning his calls.

23 Again, it's just overreaching to try to make the
24 case that this is intrinsic evidence of something that it's
25 not.

1 Again, we cite many examples of this in our motion,
2 the picking up women in bars, and probably most notably the
3 conversations relating to murder which we cite at length.

4 Now, under Rule 404(b), I think the Government is
5 trying to use this evidence as pure character evidence. That
6 Mr. Mohamadi acted in conformity with these-- Basically
7 trying to say that he is a bad person and so, therefore, you
8 should convict him on the crimes in the indictment. Which is
9 precisely what Rule 404(b) is designed to exclude.

10 Now, I guess the Government's theory is that Mr.
11 Mohamadi is trying to teach Mr. Bryan or talk him into a
12 scheme or win his trust over. Again, the reality is proved by
13 the transcripts.

14 Those transcripts, first of all, they are hard to
15 understand at all what they're talking about. And
16 specifically the murder conversation appears to be some kind
17 of long, rambling story about some other event that, again, it
18 just not simply tied at all to this case. And it just is
19 clearly 404(b) evidence. And if not, it would certainly be
20 inadmissible, we believe, under Rule 403.

21 In addition to those conversations, there is also
22 conversations regarding prostitution. Again, we have
23 identified what we believe are very narrow portions of that
24 overall conversation which should not be admitted under Rule
25 403.

1 Now, we realize that the Rule 403 standard is a high
2 one, but, again, what we have identified are a very few
3 instances in which their conversations just go beyond the
4 bounds. I mean, the derogatory comments about women and
5 racial minorities are precisely the type of things that we
6 think could enflame the jury and distract them from the issues
7 at hand.

8 So, with that being said, Your Honor, we
9 respectfully request that the portions of the transcripts that
10 we have identified in our motion be excluded.

11 THE COURT: All right, thank you, Mr. Corey.

12 MR. WALUTES: Your Honor, I apologize, I know some
13 of the grammar in my motion wasn't letter perfect. I tried to
14 get something in writing to the Court before today.

15 THE COURT: That's all right.

16 MR. WALUTES: The bottom line is it is the crime,
17 Your Honor. It isn't pretty, I concede that. I know Judge
18 Brinkema in one of her cases said, you know, listen, the
19 Government wasn't in there, it was your client talking, it is
20 a tape of your client.

21 Is there foul language? There is. Are foul words
22 used like punctuation through the entire tape? They are.
23 Your Honor, that is absolutely true.

24 It is also true that the tape is the crime. I think
25 that to the extent there is any prejudice, it is certainly

1 outweighed by the probative value. I don't believe that it is
2 404(b). I think Chin speaks directly to this type of case.

3 We have a relationship which is predicated on, I am
4 hiring you to kill someone for me. And then the level of
5 trust, the fact that there is a videotape, and one needed to
6 orient to themselves. At one point the defendant in this case
7 tells inmate number 3, shhh, when he says the taxicab driver's
8 name. The defendant is very afraid that they are too close to
9 other inmates. The videotape shows all these things, Your
10 Honor.

11 The entire videotape shows the nature of the
12 relationship, the confidentiality of the information. It
13 eliminates all the defenses that one might imagine could be
14 advanced in this type of case where the Government has such
15 evidence.

16 But, Your Honor, the videotape is the crime. And to
17 try to parse it, it is incredibly unfair to the Government.
18 It is intrinsic evidence. It is the story.

19 And given-- I cited, I know I blocked a lot of
20 quotage out of, what little few case there are on
21 solicitation, but the Government must show the surrounding
22 circumstances. The jury is entitled to figure out for
23 themselves whether or not this defendant really meant to kill
24 someone.

25 These are very serious charges, as this Court is

1 well aware, and the tape proves it. Your Honor, the parts
2 they object to, and obviously I was reading them very rapidly,
3 I am trying to clip it down because I think we can do this
4 with certain clips. I don't think we have to play four hours
5 of tape. But the tape is inmate number 3 and the defendant
6 talking on two days inside the Alexandria Detention Center
7 going over the plan to kill this taxicab driver. And part of
8 that is the financial reward and the position in the
9 prostitution business. Does the defense--

10 THE COURT: Well, clearly the plan to kill the
11 taxicab driver is the crime. And the reward is the position
12 in the prostitution business. And in part the conversations
13 are relevant to show that Mr. Mohamadi was in the business,
14 that he had the money if that's what the informant wanted.
15 And those are pretty clear.

16 The conversation about the drugs and the attorney
17 being fired for not agreeing to violent the law, and also the
18 prior homicides, are pinpointed events which are, you know,
19 obviously prejudicial, it's just a question of whether its
20 probative value is outweighed by that prejudice.

21 So, tell me, focus in on that, why that can't be
22 redacted and you still get the full flavor of the crime.

23 MR. WALUTES: If I could, Your Honor, I want to put
24 into two boxes, if I can, the inmates' conversations and then
25 the defendant's telephone conversations with Mr. Dominik

1 Brown. They apply to different counts. There are some shared
2 similarities.

3 In the box with the conversations with inmate number
4 3, the defendant there is talking about his experience in
5 murdering. There, Your Honor, the Government believes that
6 that is this crime. It is asking a person to commit a murder.
7 He is telling him, Your Honor, he is telling him how to dress
8 as either a UPS deliveryman, a police detective, a Pizza Hut
9 thing. And he has to make the person believe that this advice
10 is coming from a source that is credible, somebody who knows
11 of what he speaks.

12 He tells him that it takes the police at least
13 30 minutes if not an hour to respond to shots. That witnesses
14 never look. That if he fires at bystanders, they will flee.
15 That people wiggle when they are hit with bullets. And that
16 he should keep shooting into the body until the wiggling stops
17 and then shoot it in the head.

18 Your Honor, there is incredible detail in this
19 murder for hire. The point there, Your Honor, is that the
20 fact that he is claiming, whether it is boasting or not, that
21 he has previous experience in doing crimes of violence, I
22 think, Your Honor, it is not any more prejudicial than the
23 crime being charged and it is probative of the fact that the
24 man is portraying himself as being an expert in this field,
25 someone whose advice is sound, and that this is a crime that

1 can be committed successfully.

2 And I believe, Your Honor, the Government is
3 entitled to that, for the jury to hear that to determine for
4 themselves whether or not they believe that's true.

5 The Government is not trying to say, and the defense
6 may argue, that he didn't commit any prior murders. The point
7 here is he is trying to make the inmate believe that he did
8 commit prior acts of violence and that he knows of what he
9 speaks. And that, Your Honor, goes to the crux of the charge.

10 The drug dealing, Your Honor, I think is being
11 discussed as something that could you set me up in that
12 instead of prostitution. And the man says, I don't do that
13 anymore.

14 Given that Ms. Riley will say that he did drugs in
15 front of her, Your Honor, I don't think there is any prejudice
16 there that outweighs the probativeness of having the complete
17 videotape interaction with inmate number 3 before this jury.
18 They won't be able to later claim that this is some sort of
19 fanciful, imaginative, that all these are just bizarre claims.
20 If they have the whole tape, the jury can for themselves
21 decide whether this is a farce, if this is imaginative or if
22 this is real.

23 Your Honor, I believe that that is the strength of
24 the presentation.

25 If I could move to the second box, which is the

1 telephone conversations with Dominik Brown. The first two
2 that they don't object to, Your Honor, I want to give it to
3 the Court in context, he is calling Dominik Brown, he is
4 having him in an emergency fashion-- Because his family has
5 just told that him that Ms. Riley is going to the grand jury,
6 flying from Miami to Alexandria. He wakes her up at 2 in the
7 morning. She hangs up on him. He is telling Mr. Brown this
8 call has to go through. He is telling her to write it down.
9 He has her read it back. Those are the first two calls.

10 Then we have the coming back, he was checking up on
11 Mr. Brown whether he in fact went to the federal grand jury.
12 Mr. Brown is saying, I couldn't get down there, they won't let
13 people without grand jury subpoenas down into the grand jury
14 area in this federal courthouse.

15 And then he is asking him to get in contact with
16 her, find out what she said. He tells her what text
17 messages-- And she will be testifying, Your Honor, as to the
18 text messages that she received that you can clearly hear.

19 And that then when he finds out that she sends back
20 a message saying, I've asserted the Fifth, he gets furious.
21 And you can hear it on the tape, Your Honor, the tone. And
22 then he starts to say how he will not have as much
23 maneuverability in the defense he advances. I admit they are
24 not complete sentences, but I think the Government is entitled
25 to the inference.

1 And, Your Honor, in the conversations he is talking
2 about how Mr. Jenkins would not intercede and stop her from
3 appearing before the grand jury. And then after she has
4 appeared in the grand jury he is furious with Mr. Jenkins.

5 And Your Honor, I think we can-- I am willing to
6 stipulate to the name. I am willing to put the name into it
7 so it is clear to the jury that none of the current counsel is
8 Mr. Jenkins. But he is furious with Mr. Jenkins for not
9 interceding.

10 The Court needs to be cognizant of the fact that in
11 Count 9 this same witness, AI, the defendant's girlfriend,
12 went into the state proceedings when he was then represented
13 by Larry Brown and lied and perjured herself.

14 And so, Your Honor, he is contrasting Mr. Jenkins'
15 performance to Mr. Brown's. And the witness, I will proffer,
16 will testify that her testimony and such, she went to Mr.
17 Brown and saw him after the defendant told her to go do that.
18 And so, she worked through with Mr. Brown.

19 So, there is a contrast to be drawn. The fact that
20 Mr. Jenkins looks very good on these recordings, that he is
21 very ethical, I am not sure how there is prejudice to the
22 defendant, Your Honor.

23 The fact is, he doesn't want an ethical attorney.
24 He does not want Mr. Jenkins. And so, I don't see the
25 perception that it is not relevant, Your Honor. I think it is

1 relevant. He is contrasting the two counts, 9 and 10, and the
2 different attorneys he was represented by.

3 There is no prejudice in this case because these
4 attorneys were never at any point representing him.

5 And so, we would suggest to the Court that the
6 discussions with the attorney is, frankly, not prejudicial,
7 but it is extremely probative of the fact that this defendant
8 is seeking to have a witness tamper with a witness, which is
9 the charge, Your Honor.

10 The fact that he says he then might as well plead
11 and he cuts the sentence short, he says that he can take the
12 time in federal prison as a soldier, Your Honor, that is an
13 admission by the defendant of guilt. An innocent person
14 doesn't start to speculate about their ability to serve a long
15 sentence.

16 So, it is the jury hearing a tape of this defendant
17 after he has learned that a witness has gone into the grand
18 jury and potentially testified-- Because he is the one who
19 doesn't believe her claim to have asserted the Fifth, he says
20 that the feds don't get pissed, they immunize. And, Your
21 Honor, I think it is extremely probative.

22 There was one other thought, Your Honor, and
23 apologize, it slipped out of my brain.

24 But the point is, Your Honor, he is trying to
25 manipulate the system. And the jury, I believe, is entitled

1 to hear that so that they can discern his intent when he was
2 trying to get-- I should tell the Court, the first two calls,
3 he keeps saying, he knows he is on a recorded jail call, he
4 keeps saying, listen, everything I am telling you is the
5 truth, isn't it, Amanda. Everything I am telling you the
6 truth.

7 So, if you listen to those calls, facially it would
8 look like the defendant is claiming what he is saying is the
9 truth. When he hears that she may not have said what he told
10 her to say, he is furious. Which would suggest to one that
11 perhaps what he was telling her to say wasn't the truth.

12 Obviously, that's what's going to be argued at this
13 trial. That's why I believe I need both sides of the same
14 coin, Your Honor. I don't believe that there is any prejudice
15 to outweigh that.

16 And, Your Honor, I am sorry, I know the Court has
17 already addressed the prostitution and foreshadowed its
18 thinking on that point, but in the topic about the
19 prostitution, he tells inmate number 3, listen, whenever you
20 are on a telephone call where the feds might be taping you,
21 you always say it's legit, it's just an escort service. You
22 know and the women know that it's illegal, but you always say
23 it's legit.

24 The point I make there, Your Honor, is I am entitled
25 I think to take that part of the tape and contrast that to

1 what he is telling the witness before she travels to
2 Alexandria to testify before the federal grand jury. This is
3 a defendant who thinks he is being very clever. That whenever
4 he is on a taped thing, he will facially say-- Your Honor, I
5 know the Court has already heard this a year ago in a
6 different motion, but, I mean, for the telephone privileges
7 for six months he is reading Bible passages into the telephone
8 so that people will believe he is now Christian and so inmate
9 number 3, who is a Moslem, is just persecuting him.

10 I mean, manipulation is the essence of this case, it
11 will be a theme.

12 THE COURT: All right, thank you.

13 Mr. Corey.

14 MR. COREY: Yes, just very briefly, Your Honor.

15 I think the Government is giving Mr. Mohamadi far
16 too much credit here in their characterization of this as one
17 giant scheme to win over Mr. Bryan. Again, the tapes show
18 multiple different conversations at different points in the
19 jail.

20 And it would be very easy I think, Your Honor, for
21 the Government to simply parse out the sections of the tapes
22 and the recordings that we've identified. We are not asking
23 for a lot. Frankly, we're not challenging a lot of the tapes
24 and the recordings.

25 On a couple of very specific points. The efforts to

1 retain counsel. You just heard the Government speak a lot
2 about what these mean or don't mean. I think the tapes, the
3 actual transcripts show what they mean. They show Mr.
4 Mohamadi complaining about costs and someone not returning his
5 calls. And that's all they mean, and it's not something that
6 is proper or relevant for the jury to consider.

7 Likewise, the conversations about drugs and
8 homicide, they just simply are 404(b) evidence and are not
9 tied to the allegations in this case. They are not intrinsic
10 to those allegations.

11 And I want to be perfectly clear here, the
12 Government just spoke a lot about portions of the tapes that
13 we're not objecting to. I just heard the Government talk a
14 lot about people wiggling and testimony about how you should
15 dress, as a UPS agent. That's not what this motion raises, so
16 I think it's important to keep in mind as well.

17 And that's true also with the comments the
18 Government made about the conversations with Mr. Brown and
19 taking the Fifth. Again, we have identified a very small
20 portion of those conversations that are simply extraneous.

21 So, I think that's important to keep in mind, how
22 easy it would be to eliminate the objectionable material here.

23 THE COURT: All right, thank you.

24 Well, I will take it under advisement. I appreciate
25 the arguments. I have not had the time to study the tapes,

1 the transcripts of the tapes sufficiently to make a decision.

2 I am concerned, frankly, only about the reference to
3 prior murder and prior drug dealing. I think that the
4 conversations about the prostitution ring and the language
5 used all fair game. They are all the words of Mr. Mohamadi,
6 and the Government has a right to play them. Although the
7 jury may take some umbrage with the terms used, they are in
8 fact the words being used. And that the prostitution ring
9 conversations are very much an integral part of the
10 solicitation to commit murder.

11 But I will look again at the drug dealing and the
12 prior reference to homicides. Those are in my mind separate
13 incidents which are by their very nature prejudicial. They
14 may nonetheless be sufficiently probative to be admissible
15 under 404(b) or, as counsel seeks, integral to the crime
16 itself.

17 All right.

18 MR. NACHMANOFF: Your Honor, just to keep this
19 moving, there is another issue that we would like to raise,
20 which is that we have had the opportunity to discuss at some
21 length with Mr. Mohamadi taking Count 5, which is the felon in
22 possession count, which was the subject of a lot of
23 litigation, and we understand the Court's ruling with regard
24 to not severing it, but in light of the fact that it has not
25 been severed, Mr. Mohamadi has agreed and signed a jury trial

1 waiver so that that count could be addressed as a bench trial.

2 In my discussions with Mr. Walutes, he has agreed to
3 that.

4 And so, if the Court is willing, we would like to
5 take Count 5 and deal with it as a bench trial. I presume
6 that the Court could take the evidence that is presented to
7 the jury, and then after the jury is deliberating the
8 Government could address those elements that have to be
9 addressed outside the presence of the jury. That obviously
10 would take away the issue regarding his prior conviction,
11 setting aside whether or not he decides to testify.

12 So, at this time what I would ask to do is to hand
13 up the waiver and ask the Court to confirm that the Court is
14 willing to do so and can confirm, obviously, that the
15 Government is willing to do so as well. That would leave us
16 to remove some of the jury instructions at a later time.

17 THE COURT: All right, thank you.

18 MR. WALUTES: Your Honor, that is an accurate
19 representation of the Government's position. I think that the
20 case law is all very instructive that the Government should
21 join this motion so as to remove any possible taint to the
22 defendant. And we would ask the Court to do it in the way Mr.
23 Nachmanoff has proposed, which is to allow the trial to
24 proceed. Because, as we argued in severance, we believe all
25 that information will then give the Court everything it needs

1 to have except certified conviction.

2 THE COURT: All right. I am certainly willing to
3 approve the waiver of the trial by jury and decide the
4 possession of the firearm by a convicted felon in a bench
5 trial and do it the way you have proposed. That's the way I
6 have proceeded in the past, and it worked well then.

7 Mr. Mohamadi, you understand you have a right to a
8 jury trial as to Count 5, the possession of the firearm by a
9 convicted felon offense?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: And you have discussed your right to
12 waive the right to a jury to consider that and instead have me
13 make a determination about whether the evidence has
14 demonstrated your guilt beyond a reasonable doubt?

15 THE DEFENDANT: Actually, sir, I would like to take
16 that back. I just don't want to waste the Court's time and
17 change it later on. I think I would just rather have them all
18 together then.

19 THE COURT: All right. Well, it's your decision
20 whether you want to waive your right to a jury trial on that
21 count or not.

22 THE DEFENDANT: If it's possible, can I get 6, 7 and
23 5 as a bench trial? I would be willing to do that if it's
24 possible.

25 THE COURT: 6 and 7 are--

1 MR. WALUTES: Your Honor, Mr. Nachmanoff and I have
2 already discussed that. The defendant, there are certain
3 counts he would rather not have the jury try. The Government
4 is not willing to do that. The only one we are willing--
5 Because we think is, Old Chief, the Supreme Court, is very
6 instructive. The only one we are willing to remove is the
7 felon in possession because of the inherent concerns the
8 courts have expressed, and they have advised the Government to
9 always enter into such a waiver.

10 But we are not willing to waive on the others unless
11 he would like to waive the jury as to all counts.

12 THE COURT: All right. That's where we stand then.

13 So, we are just, the solicitation to commit murder
14 for hire, the Government is unwilling to waive the jury as we
15 have discussed in the past, that the offenses are intertwined
16 in such a manner that I have already made the determination
17 they should be --

18 THE DEFENDANT: What do you suggest, Your Honor?

19 THE COURT: -- tried together. Go ahead.

20 THE DEFENDANT: What do you suggest, Your Honor?

21 THE COURT: It's not my job to act as your counsel.
22 You have excellent counsel.

23 THE DEFENDANT: I agree.

24 THE COURT: And you need to weigh the benefits. And
25 it's a--

1 THE DEFENDANT: How long do I have?

2 THE COURT: You have a right-- Well, you are here
3 in Alexandria now. Your counsel is available. Think about
4 it. It's all a balancing test, right. You know, on the one
5 hand you have got me making the decision. And on the other
6 hand, if a jury is making the decision, they are going to hear
7 that you are a convicted felon, it doesn't help you,
8 especially if you are otherwise not going to present a defense
9 to the charges.

10 Obviously, if you took the stand, the jury would
11 find out that you were a convicted felon. If you don't take
12 the stand, then, unless there is some other vehicle, they
13 don't find out you are a convicted felon. So, you preserve
14 the confidentiality of that information.

15 There would be a limiting instruction saying they
16 can only use the information of the prior conviction for
17 purposes of Count 5. And I, of course, will strongly urge
18 that they do so. I can't tell you what jurors are going to
19 think or not think. Jurors are independent community persons
20 who have minds of their own.

21 So, you risk prejudice to your case and changing the
22 focus from the Government's burden of proof beyond a
23 reasonable doubt of each of the elements of each of the counts
24 you are charged with. So, that's the risk as well. I know
25 that counsel has told you all of this.

1 So, take some more time, think about it, let us know
2 ahead of time.

3 THE DEFENDANT: Actually, I thought about it, I am
4 going to go ahead and go with the exclusion. I just think I
5 was thinking a little irrational because of Mr. Walutes' fairy
6 tales. So, it kind of riled me up a little bit. But now
7 after listening to you, I think Mr. Nachmanoff did make a good
8 suggestion, and I will go ahead and take that as a bench.

9 THE COURT: Do you need any more time to talk with
10 counsel?

11 THE DEFENDANT: No, sir, I am sure, I am pretty
12 sure.

13 THE COURT: All right. So, you want to waive your
14 right to a jury trial just on Count 5 and have me decide that
15 as the trial judge?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: All right. I find that you have
18 knowingly and voluntarily waived the right to a jury as to
19 Count 5. I will accept your waiver of the jury on Count 5 and
20 we will proceed in a bench trial.

21 We will hear the evidence that comes out during the
22 jury trial and any subsequent evidence after the evidence is
23 concluded for the jury portions of the case.

24 All right, have a seat, counsel.

25 Mr. Nachmanoff, we have the remaining motions that

1 Mr. Mohamadi has filed. How do you want to proceed there?

2 MR. NACHMANOFF: We do, Your Honor. And let me say,
3 there are seven motions that were filed. The Court has those.
4 The Government has filed a response. I know Mr. Mohamadi
5 would like to have the opportunity to address the Court on
6 those seven motions.

7 I also want to advise the Court that Mr. Mohamadi
8 has another six motions that he would like the Court to
9 consider. They have been written, they have not yet been
10 filed. Two of them were sent to us earlier this week.

11 And I don't want to blame the Northern Neck Regional
12 Jail because they were actually very accommodating in trying
13 to send them, but the way they were sent to us, it made it
14 impossible for us to sort them out. They were rather long
15 faxes, and by the time we had gotten them the pages were
16 misordered.

17 So, I wanted to make sure the Court was aware that
18 Mr. Mohamadi had done his best to provide those to us over the
19 weekend. And now that he is here, I think we can sort out
20 those two motions that have been sent to us in incomplete
21 form. We can then collect the rest of those motions and
22 hopefully file them over the weekend or at the latest on
23 Monday. I know that Mr. Mohamadi would like the opportunity
24 for the Court to consider those before the trial starts.

25 THE COURT: All right. I will allow them to be

1 filed. And you will supply the Government with those filings?
2 Are you going to handle--

3 MR. NACHMANOFF: Yes, we will arrange the mechanics
4 of filing them. Whether we do it electronically or through
5 the Clerk's Office, I think it will depend upon the total
6 volume. But one way or another, we will make sure that they
7 are filed with a praecipe, copies provided to the Government
8 and that we provide a courtesy copy to the Court.

9 THE COURT: All right. I will review them and
10 determine how to best move forward after I look at them and
11 figure out what they are and what needs to be done.

12 MR. NACHMANOFF: Thank you, Your Honor.

13 THE COURT: So, Mr. Walutes, at this stage just wait
14 for further instructions as to how to proceed in responding or
15 not responding to them.

16 Okay. All right, let's deal with the motions we
17 have today. Mr. Mohamadi, are you going to-- The podium is
18 yours, sir.

19 THE DEFENDANT: Which motion are we starting with?

20 THE COURT: Why don't we go A through G.

21 THE DEFENDANT: I don't have an order, sir, Your
22 Honor.

23 THE COURT: Well, you go ahead and I will react.

24 THE DEFENDANT: Okay. The first motion is
25 defendant's motion to direct production of documents and

1 objects and compel all evidence favorable to defendant.

2 Basically I have tried throughout the whole past
3 seven months, I have tried to obtain this information which I
4 feel is exculpatory to my defense. And I have encountered
5 numerous problems, especially Mr. Salvato. The Public
6 Defender's Office, I mean the Federal Defenders, Mr.
7 Nachmanoff and Ms. Minter are doing the best that they can,
8 but just the fact that they received my case in such a late
9 stage and stuff that they are dealing with now, which I
10 appreciate greatly, I just feel like a lot of the stuff isn't
11 getting attention or is not, we are not able to get it because
12 of the time limit, the time restraints.

13 So, I basically filed this motion to compel the
14 prosecution from what my understanding of the law was, that if
15 I exercise due diligence-- I mean, should I read the motion
16 or--

17 THE COURT: No, I understand the motion. The
18 response that the Government has given on more than one
19 occasion, because we have talked about this before, is that
20 they don't have every conversation taped because you used
21 third parties, or that's their position.

22 THE DEFENDANT: Yeah.

23 THE COURT: But they have said that the ones that
24 they do have, they have provided, and that they are
25 irrelevant. And that's their obligation under the Federal

1 Rules of Discovery. And so, there are no more tapes and there
2 isn't any evidence that the tapes have been tampered with
3 unless you have uncovered some evidence of tapes having been--

4 THE DEFENDANT: I do have proof. Are the CDs
5 available now? I asked you guys could bring them so I could
6 show the Court.

7 MR. NACHMANOFF: Your Honor, this may short-circuit
8 some of this discussion, and Mr. Walutes can address this
9 better than I, but he did suggest to me that perhaps they are
10 not going to go with the enhanced version of the audio tapes
11 to remove this concern of Mr. Mohamadi's. I don't know if
12 that's the Government's position.

13 THE DEFENDANT: That's not the--

14 MR. NACHMANOFF: But there are both the original
15 tapes and then there are the tapes that the audio specialist
16 tried to remove the background noise. And I don't know what
17 the Government's position is on that, but that is something
18 that Mr. Walutes raised with me.

19 THE DEFENDANT: We are talking about the phone
20 calls, not the wire recordings. I am referring to the phone
21 calls that were provided to me during discovery. I can
22 basically show through the--

23 THE COURT: What phone calls do you think are
24 missing?

25 THE DEFENDANT: Well, I know for a fact because the

1 calls are 30-minute calls, and what the Government provided
2 were, they were cut in half. All the calls, all the 30-minute
3 calls were cut in half.

4 I am not going to hang up in the middle of a call
5 each and every one of them. And most of them were in the
6 middle of what I feel are exculpatory conversations. And
7 during my review, reviewing of the calls, I basically
8 highlighted, as I wrote in the motion, which ones were one
9 shortened, how many of them were shortened. And just from
10 listening to them, you can see that they were cut off.

11 And along with the CDs, the Government provided a
12 list of calls with the copies on it. And on it it tells you
13 how long the call was. And on those they tell you when it is
14 30 minutes or 29 minutes. But the recordings that were
15 provided, they only went 14, 15 minutes on those calls and
16 they were cut short.

17 And there were over maybe 150 calls that are cut
18 short. And I basically narrowed them down to the ones that
19 were in the midst of conversations that were either
20 inculpatory or exculpatory, and in that list I wrote down
21 which ones I thought were relevant. But the fact that there
22 were so many other ones that were cut short, there is no way
23 for me to identify impeachment stuff that I can use because
24 there is a ton of witnesses that the Government is going to
25 present from these calls, people that I was communicating with

1 where I can stand up and refute some of the nonsense that they
2 are going to say on the stand with these calls. And there is
3 a ton of calls missing.

4 On top of that, there are specific months where
5 calls are missing for a specific reason. Mr. Burnham was the
6 main instigator of this whole situation, and he controlled
7 these calls. He has deliberately withheld-- And I am not
8 accusing the prosecutor on this aspect, I feel like he didn't
9 receive them either. I don't think he received these months
10 either.

11 And the way I can prove that is just from, A, I've
12 tried to get the investigator to get-- I think he has already
13 subpoenaed inmate calling solutions to get-- Because any time
14 I spoke with anyone, they would have to set up an account.
15 And when they set up an account, all those calls are listed
16 also with the time of the calls that they made.

17 And I asked him to get that so I can collaborate
18 with them. But the way I can prove it is I had in my bag, I
19 had to pack everything up, I have a bag, I have a phone bill
20 of Amanda Inge she had sent me during the course when we were
21 communicating, and it shows her calls that are missing for
22 that whole month, but on her phone bill they show up.

23 And they are trying to say that it is because of
24 these three-way calls, using other pin codes. Mr. Burnham
25 from the get-go has been vigilant on every single call. If I

1 made a three-way, I would get charged on that day and be sent
2 out of the unit.

3 So, that is not the case because there is cameras
4 inside the unit. The stuff I was doing-- When I was making
5 three-ways and stuff in Fairfax, they weren't able to monitor.
6 But when I came to Alexandria, as soon as I started making
7 three-ways, numbers were immediately blocked, I stopped, I
8 stopped making three-ways.

9 THE COURT: What month are you talking about where
10 you think that there are calls which are missing?

11 THE DEFENDANT: I have the exact dates. There is an
12 important call on 6/30/08 that if you follow the calls, as I
13 did, you can see where the conversation was left out. Where
14 it was in midst of the conversation and certain parts were
15 left out.

16 7/2 to 7/27, all those calls are missing. 7/27 to
17 8/16, all those calls are missing. 8/17-- Basically all the
18 periods I have listed-- I have only had one charge, two
19 charges while I was in Alexandria. The first five months I
20 didn't have any charges. All the charges occurred after they
21 initiated the so-called undercover operation. Then they
22 started piling on the charges for ridiculous stuff, like I had
23 an argument with a deputy because he wouldn't let my roommate
24 take a shower. Stuff like that.

25 There weren't any issues before that where it would

1 cause me to go to the hole where I can't use the phone. Just
2 from the calls that you see, that's all I did, I was on the
3 phone all day.

4 But the reason why certain ones are very important
5 is because they deal with the intent with some of the
6 accusations the Government is making, I wanted to refute with.
7 For example, they are claiming that the address was obtained a
8 certain way, which I plan on refuting with phone calls. But
9 what they did was they blocked out that whole month of phone
10 calls.

11 And then this conversation that I had with Amanda
12 that they have specifically held out. And I know for a fact
13 because I know the conversations I had. And it refutes a lot
14 of the stuff that they are saying.

15 THE COURT: Okay.

16 THE DEFENDANT: So, the calls is the one thing.

17 Then dealing with the audio and visual recordings,
18 it is processed sound. These are digital calls. And once we
19 go to trial, you will see my stance as to the so-called murder
20 for hire sting. And it will explain what the real, what was
21 really going on during that period.

22 And what they did with the audio and visual is, for
23 example, if you take a book and you take out two chapters of
24 it and then with those two chapters try to explain the whole
25 book, that's what they did with these calls. They processed

1 the stuff that they wanted be heard.

2 That's why if you look at the transcript, there is
3 so much stuff that doesn't make sense. And there is specific
4 parts where I feel it is very exculpatory that have been
5 processed out.

6 And so, I know for a fact that they have been
7 tampered with because if you look at the visitation-- What
8 was the date on the visitation? I think it was the 22nd
9 visitation, and there is another visitation on the 29th. If
10 you look at the 22nd visitation, it has the full phone call
11 with me talking and the informant talking.

12 When you look at the 29th call, they have taken me
13 out and just have the informant talking.

14 So, there is a lot of stuff where they have changed
15 it. And from what I have read from Starks, for them to
16 introduce all this stuff, they need to prove that none of it
17 has been altered or-- I mean, I have the list of--

18 THE COURT: I understand the cases. And you
19 understand you have a right to completeness. So that if
20 sections have been put in by the Government that they want to
21 use, you have a right to use other portions of that that
22 exist.

23 THE DEFENDANT: My issue is the fact that it is
24 processed sound. I have tried to--

25 THE COURT: What do you mean by processed sound?

1 THE DEFENDANT: Because there is so much background
2 noises, their operator has the ability to clear certain things
3 and has the option not to clear certain things. And what I am
4 saying is that they didn't clear all of the conversations for
5 specific reasons because-- I mean, during the whole
6 conversation he is leading the conversation. The Government
7 told him before he was strapped up, okay, go get this and go
8 get him to say this. And he basically led the whole
9 conversation, trying to implant all the specific stuff for the
10 prosecution to occur, which I commend them on that--

11 THE COURT: You think that there is conversation on
12 there where you said something different than --

13 THE DEFENDANT: I know--

14 THE COURT: -- the Government alleges and that they
15 haven't enhanced the sound on that portion?

16 THE DEFENDANT: Exactly.

17 THE COURT: I understand.

18 THE DEFENDANT: Yes, sir. And you can tell from the
19 recording where it blurs out. I mean, they have, it's audio
20 and visual. So, with the audio and visual, I forget what type
21 of system they used, but what they do is it's processed onto
22 the mechanism, then they have to upload it onto a digital,
23 either a laptop. And so, there is just so much room for them
24 to alter and do whatever.

25 I'm not saying that they did it in bad faith or

1 whatever. There is no way I can prove that they did anything,
2 but I know for a fact there is parts of the conversation that
3 have been processed out just by the fact that the video will
4 blur out, but the sound will still keep going.

5 So, there is just a lot of stuff that I don't think
6 is-- I would just like for it to be processed where I get
7 everything for the Court to be able to--

8 THE COURT: Let's hear from the Government on that.
9 Have a seat for a minute.

10 Mr. Ben'Ary.

11 MR. BEN'ARY: Thank you, Your Honor. Your Honor,
12 after receiving the defendant's motion we did again speak to
13 the officials at the Alexandria City Jail to ensure that we do
14 have the complete set of the defendant's phone calls. And
15 secondarily that what we have is in its original condition.
16 That is to say, has not been tampered with.

17 We have been assured on more than one occasion that
18 we do have everything that they collected and that it has not
19 been tampered with.

20 Now, there is some automation involved in the jail
21 recording, the jail telephone call recording process. It is
22 conceivable that it may not have recorded a call here or
23 there. But everything that we have has been produced, and it
24 has been produced in its original fashion.

25 THE COURT: Well, did you ask them why there was

1 absence of calls for periods of time? I mean, you may not
2 have been aware of the specific times where Mr. Mohamadi
3 believes calls were recorded but not produced, you know, the
4 6/30 and the periods of July and August of '08.

5 MR. BEN'ARY: I think it's our understanding that--
6 Pardon? Okay.

7 We have checked with those specific dates where
8 there are absences, and again they have been produced,
9 everything that we have.

10 The only explanation we can figure out as to why
11 there are gaps with absences, it's a combination of Mr.
12 Mohamadi's actions in trying to evade the recording system and
13 his loss of telephone privileges.

14 THE COURT: All right. The other argument that Mr.
15 Mohamadi raises is that portions of the audio visual tapes
16 have been redacted, I guess. Or some of the favorable
17 information the Government has enhanced and the unfavorable
18 evidence it hasn't.

19 Tell me how the process worked with the production
20 of the tapes.

21 MR. BEN'ARY: There are essentially two sets. There
22 is an original, which is just as it was recorded.

23 THE COURT: That has been produced.

24 MR. BEN'ARY: That's been produced. And as the
25 defendant says, there is pretty loud background noise in

1 portions of that. So, we undertook to sort of clean it up
2 through enhancement.

3 So, in that sense we do have an altered set, but the
4 way it was altered is the background noise was sort of toned
5 down for the entire tape.

6 Now, we are sort of discussing which one ends up
7 being more useful for the jury. At this point I think it is
8 our plan to introduce both. And we have a witness who
9 actually performed the enhancement who will testify and be
10 subject to cross-examination as to the procedures that he used
11 to clean up, so to speak, the background noise.

12 THE COURT: Will his testimony be that he cleaned
13 up, removed the background noise of the entire tape versus
14 just portions of it?

15 MR. BEN'ARY: The entire recording.

16 THE COURT: Okay.

17 THE DEFENDANT: Now I am just waiting for the
18 investigator to get the subpoenas to come back from the stuff
19 so I can prove the calls that are missing, that the calls
20 actually did take place.

21 And the fact that they are claiming that I dodged
22 these calls by doing other methods, I just want to say that
23 that did not happen. Mr. Burnham was very vigilant, there is
24 cameras there. When I would try to get on the phone with
25 someone else that would make a call to make a three-way for

1 me, he would find out, the next day I would get a charge.

2 So, that is just false because he wasn't just going
3 off the calls, he was monitoring me on the digital cameras
4 that Alexandria is equipped with. So, that's not true. And
5 once we get the subpoenaed calls, I can show exactly that the
6 calls were made and they are purposely holding them and not
7 providing them.

8 THE COURT: All right.

9 THE DEFENDANT: Now, before I got to the calls, I
10 skipped a lot of stuff. There is a lot of-- Like, for
11 example, the defendant's Sprint phone bill that was obtained
12 by Detective Hickman in 2007.

13 Mr. Brehm when he had my case, he took it upon
14 himself to get all the stuff that was filed in Alexandria
15 jail, I mean Alexandria courts. And while going through all
16 that stuff, I saw a subpoena that Detective Hickman had filed
17 to Sprint to get my phone bill and anything relating to it,
18 text messages and all that stuff, because Ms. Riley claimed
19 that I sent her a text message of Amanda Inge's address and
20 all this other stuff. Which they haven't provided a copy of a
21 text message, phone call.

22 And she was the main reason how I was targeted. She
23 provided the officer with my name and number. And from that
24 point forward I was the only suspect. But they haven't
25 provided anything, proven that I did make that call.

1 And my whole stance from the beginning is that I
2 want my phone bill and my records to prove that I never called
3 her, never sent her a text. And I have been trying to get
4 these calls since day one. I have numerous telephone calls
5 where I even called a friend that works at Sprint corporate to
6 try to obtain this stuff.

7 But once I was charged with this federal count, I
8 received that document where Detective Hickman had received
9 it. And then upon reviewing the supplement, I saw that he,
10 Detective Hickman actually stated in his supplement that I
11 received the defendant's phone bill and saw that he didn't
12 make any calls.

13 I received so-and-so's phone bill, the victim, and
14 saw that these calls were made. But these calls weren't
15 provided in state court. These calls haven't been provided
16 for federal court. And I think the investigator has filed a
17 subpoena to try to obtain these calls so I could prove, we
18 have got the cell site, trying to get the cell site locations
19 and the calls so I can prove my stance on that fictitious
20 robbery.

21 Number two, Amanda's phone bill for the phone she
22 shared with her boyfriend, which is the 703 number, where she
23 alleges originally to the police officers in their report that
24 I called her during the next day leaving voicemails.

25 Now, the police officers, they received all this

1 information back in June of '07. It would have just took a
2 matter of a couple phone calls to obtain these voice messages
3 which were allegedly left on her voicemail. But her phone
4 bill, those calls haven't been provided also.

5 So, I am trying to get that to prove that, you know,
6 she lied from the beginning. And all those conversations that
7 I had with her over the phone where I called her and tried to
8 give her advice about pleading the Fifth, I was the one-- She
9 wrote me. My family didn't inform me that she had received
10 the grand jury. She wrote me while I was in jail, she was in
11 Florida, and she said, look, I got a grand jury thing. I
12 don't have any money for a lawyer. The guy that she was with
13 just left her.

14 So, my whole stance was on trying to protect her
15 because she originally lied to the police, but that's a whole
16 different situation. But this call, the phone bill for that
17 number is very relevant to my defense and very exculpatory.

18 Second, Mr. Haile made a claim of, you know, moving
19 from D.C. to Alexandria to D.C., just all these stories of the
20 suspect making calls. I requested, I think Mr. Velarde also
21 subpoenaed his phone bill with the cell sites to confirm if
22 actually he did, if all this really did happen.

23 And I have also offered it to the Government. They
24 haven't provided any of this stuff either. So, you know, I
25 figured--

1 Also number four, the mental health file, I think is
2 very relevant to my defense because I don't have access to
3 this stuff. And the fact that I committed suicide or I tried
4 to commit suicide two weeks-- That's funny? I tried to
5 commit suicide because I had just received a letter of my
6 daughter going to the hospital and just overall everything,
7 being accused of robbing a cab driver. My dad was a cab
8 driver and died in his cab, he had a heart attack and was
9 found in his cab. Just accumulation of all this stuff
10 affected me to the point where, you know, after two years, my
11 trial being delayed numerous times, it got to me.

12 I am not a quitter, I have never been a quitter.
13 You know, I broke down and that incident occurred. And then
14 probably two weeks after they get all these recordings under a
15 different pretense than what they are trying to present--
16 Which I will, you know, defend against in trial. But I think
17 these mental health records are very important to show that
18 why didn't they provide me with the normal routine of when
19 someone tried to commit suicide. They are supposed to be put
20 in examination and reviewed. It's a two-week process that
21 Alexandria normally does. After two days they put me right in
22 the unit with this informant.

23 So, that is kind of very relevant to the defense of
24 entrapment that I would like to pursue if the Court allows me
25 to pursue that. And just--

1 THE COURT: An entrapment defense?

2 THE DEFENDANT: Yes, sir. Also, I have got motions
3 identifying that stuff also.

4 Now, the radio runs from Alexandria, I know there is
5 a ton of stuff. Once you get a chance to review all the
6 different incident reports, you will see a conflict of how the
7 timing of when they met with Mr. Haile and when they met with
8 Riley, who miraculously popped up. I was robbed also,
9 blas-a-blah, this is the number of the guy that robbed me,
10 yadida.

11 So, I just basically wanted the radio runs to
12 confirm what actually happened because there are so many
13 different conflicts in the reports of timing.

14 So, I think this is very important to prove when
15 actually Riley did get involved and when the police who came
16 on the scene-- Because what they are alleging is that they
17 were there inside of five minutes and that's why the canine
18 tracked it all the way to Amanda's apartment.

19 But in the original report, the cab driver tells
20 Detective Hickman there was people around that area. But the
21 canine guy claims that there was nobody around, so the dog
22 could pick up the scent, make left turns and right turns
23 because no one had stepped on it. There is a lot of conflicts
24 with that.

25 Also I asked for number seven is Kimberly Riley and

1 Gebru Haile's bank statements. And from everything I have
2 read with the Hobbs Act, interstate commerce, they can come
3 and say anything. They could say, oh, Kimberly Riley was an
4 entrepreneur or this or that. And without me having any type
5 of, any way of proving it, they are going to be allowed to say
6 anything they want.

7 And I feel like these bank records will verify if
8 she is actually what she claims she is, running a business or
9 whatever, and if Mr. Haile actually earns this supposed
10 amount. It is just something I really need to defend against
11 this, the effect on interstate commerce.

12 Then Richard Bryan's recorded phone calls at
13 Alexandria Jail. I definitely need this pertaining to what
14 type of conversations he had with police officers. During the
15 recording he actually gets on the phone and speaks on the
16 phone.

17 And I just think it's very important that I get an
18 opportunity to view his phone calls to see what was going on
19 with him at that period and hopefully something exculpatory
20 could show up in that in regards to the truth and not the
21 nonsense that is being presented.

22 Now, number nine, the original 911 call which is
23 also addressed in one of the motions, this was not provided in
24 the state court. This is another incident where this, you
25 know, alleged gun in this D.C. club just pops up all of a

1 sudden in this federal case where they all of a sudden
2 provided this 911 call which is not the original 911 call, it
3 doesn't show--

4 THE COURT: This is the 911 call--

5 THE DEFENDANT: With Mr. Haile.

6 THE COURT: On the 12th, okay.

7 THE DEFENDANT: Yes, sir. And it doesn't have a
8 time, a date, what number was called, it was just a version
9 that was added on to a disk which they could have done
10 anything to.

11 And there is a lot of variations where it seems like
12 he has been cut off. And I have got serious problems with
13 this call because, A, they didn't provide this in state court
14 and all of a sudden now they have it.

15 And when he was asked the description, he starts to
16 speak, and his speech is mumbled up, but then in the end of
17 the call the lady says, she repeats everything that he told
18 her. And she says, oh, so, it was a black individual,
19 blas-a-blah.

20 Now, that was a very important disputed factor in
21 the state court where he originally told Mr. Lion that it was
22 a black individual, then he told Detective Hickman it was a
23 dark complected person. Then he came to the preliminary and
24 he said, oh, no, he was Middle Eastern, I know Middle Eastern
25 people. Then he came to trial and he said, changed it up

1 again.

2 So, there are just so many lies that are occurring.
3 I felt just felt, you know, something is not right with this
4 911 call. I would like to get the original form and the names
5 of the dispatchers in case Mr. Velarde would like to interview
6 them to find out what they have to say about it.

7 The training of the canine. They claim that the
8 canine is able to make left turns, right turns and all that
9 stuff. I have never heard of that, but I am not a police
10 officer and I don't have-- I have never heard of them doing
11 that. And I would just like to get something, some type of
12 prove to what they are saying because, like I said before,
13 they are going to get up on the stand and say all type of
14 stuff. I would just like to have an opportunity to see what
15 the official training guidelines of these facts are.

16 Number 11, Ms. Riley claims that she was an escort
17 and she had ad on craigslist. Now on craigslist, all these
18 adds, craigslist has had a lot of problems from what I have
19 seen in the Washington Post and a lot of cases and stuff.

20 Now, everything on the Internet leaves a footprint.
21 So, that's why I asked for her alleged craigslist
22 advertisement that I allegedly called because I was so
23 desperate to get her companionship. And I would like to see
24 that ad since she was working that night and I called her from
25 that ad. But that hasn't been provided, a copy hasn't been

1 provided. It is just, you know, hearsay.

2 Number 12 is camera footage. You know, the
3 locations that Mr. Haile claims that, you know, I flagged him
4 down, this is a downtown area. I used to do construction, I
5 have done some jobs in that area remodeling offices and stuff.
6 All of these buildings have security cameras. Every corner
7 there is banks. It's a very commercial area that this alleged
8 incident occurred. And there is tons of opportunities for
9 camera views.

10 And I don't want to be funny, but just watching TV
11 and all the different reality cop shows and stuff, they are
12 able to track down gas stations where a suspect ran off. And
13 they are like, okay, boom, we've got them on this camera view.
14 I mean, it is 2009, I would think that they would provide some
15 type of evidence linking me to this stuff.

16 So, now I am just trying to backtrack because I am
17 innocent, it's much easier for me to prove that I am innocent
18 because all this stuff is in my favor.

19 And I have tried to get counsel-- I gave this list
20 to Mr. Salvato. It's all this list that I gave to Mr.
21 Walutes, I gave to Mr. Salvato. He did not obtain one item.

22 And so, number 13, now this is any evidence linking
23 defendant to the new allegations made in the District of
24 Columbia regarding unrelated incident where a firearm was
25 obtained.

1 In these reports it is alleged that this individual
2 threatened a dancer at Camelot and then ran to a cabbie, broke
3 his window, and then dropped the gun and ran off. Now, in
4 this process I can't imagine when he wiped the gun off and got
5 the prints off of the gun. This seems like an accident.

6 So, in this day and age you would think they would
7 have the resources to get a print off the gun to link it to me
8 instead of just, you know, making up this whole fictitious
9 story.

10 And then just the fact that, you know, I mean, Ms.
11 Minter already addressed this issue, but I have a lot of
12 problems with this. And I feel like this is turning into a
13 circus. But I will leave that alone.

14 But I would basically ask for any evidence that
15 linked me to it besides just testimonial evidence.

16 THE COURT: I think it's testimonial.

17 THE DEFENDANT: Okay. And the clubs that they
18 allege that the suspect was at, there is security footage
19 there. Why didn't the D.C. officers get the security footage
20 from there?

21 And from the reports that I read, they didn't have a
22 name. These individuals didn't identify me. They identified
23 a bald-headed guy, blas-a-blah, that came into the club and
24 just tipped.

25 Now, I don't know who this individual was making

1 this allegation, but my daughter's mother was a waitress at
2 Camelot. So, the fact that she would just say that just, it
3 just doesn't make any sense. Because if she was referring to
4 me, she would say, oh, that's Jamie's, that's Jamie's, her
5 daughter's father.

6 So, there is just a lot of stuff with this whole
7 situation that really, really irks me. But anyway, long story
8 short.

9 Number 14, the Government provided letters written
10 to Amanda during this whole two-year period, but what they
11 didn't provide is in all my letters, from the letters I wrote
12 to the Court, I always provide a number at the top.

13 So, what they did was they basically copied under
14 the number part where-- From reading the letters, they are
15 all jumbled up, they are not full letters. Certain parts are
16 kept cut, certain part aren't in. They just took certain
17 pages out of the letters which are normally five or six-page
18 letters, and I tried to make some sense of them, but they are
19 all just scrambled.

20 So, I was hoping I could get the pages, the copies
21 of them with the page numbers on them so I could put them
22 together appropriately.

23 Number 15 is all e-mails between Detective Hickman
24 and Victor Castro. This is a disputed issue where when I
25 wrote a letter to Mr. Castro to discuss with him, my whole

1 intention was-- Because when Mr. Bryan came to my trial, he
2 alleged that he was never an informant and never worked for
3 law enforcement when the trial was on December 8. And just in
4 November he made the recordings with a wire on him. I don't
5 understand how he wasn't affiliated with any type of law
6 enforcement. So, he committed perjury on the stand.

7 And my whole thing was I am just wondering, I know
8 how the police talk nowadays, they know the laws and the rules
9 that prohibit them from getting certain types of evidence.
10 So, what they do is they get around it by the way they talk.

11 So, instead of telling him, okay, you're working for
12 me, they will use indirect methods. Which is something that I
13 exposed during that conversation with Mr. Castro where I said,
14 look, I got information for you. And then he basically said,
15 well, I can't promise anything, that's up to the prosecutor,
16 but if you, if you have something substantial, then we'll
17 think about it. That's basically soliciting an informant and
18 basically making him an active informant.

19 But it is just the way they do it. They get on the
20 stand and then they say, oh, he was never working for me.
21 Which is going to be an issue that we are going to deal with
22 this so-called Fairfax individual that claimed that I hired
23 them and this is supposed to be some random act. That's why I
24 wanted that on record.

25 But one of the issues is during that conversation he

1 originally said, oh, I just got involved in that, I didn't
2 know anything about it. But in Mr. Hickman's report on June 5
3 he called Mr. Castro and asked him to run a gun check.

4 Now, that was just one e-mail. And it's kind of a
5 coincidence that he called him then and now all of a sudden he
6 is working on this case.

7 I mean, the fact that he has been involved, I feel
8 like he has been involved from the get-go. And there is just
9 a lot of stuff they are not telling me. So, I feel like I
10 have the right to have all the e-mails that pertain to me.
11 Not all of the police business, all the other confidential
12 stuff, but I feel like I should have the right to a subpoena
13 to have all the e-mails that pertain to me.

14 Number 16, all e-mails between AUSA Walutes and
15 defendant's previous attorneys Robert Jenkins and Larry Brown.
16 This is the issue that I have had, and I feel like this is a
17 Sixth Amendment violation. I mean, it is just proof by the
18 way he just stood up here and defended Mr. Jenkins' actions.

19 Mr. Jenkins was the individual that caused me not to
20 be able to contact attorneys at Alexandria Jail. Mr. Jenkins,
21 the individual that he claims is so ethical, made a three-way
22 call because he was so hard pressed on getting me as a client.
23 He would call me at the jail, and I tried to be nice to him, I
24 was like, look--

25 THE COURT: What relevance does that have to

1 anything in the case?

2 THE DEFENDANT: Because Mr. Jenkins came and spoke
3 to me. And I feel like he went and had conversations with Mr.
4 Walutes regarding my case. Because when Mr. Jenkins came to
5 speak to me, he didn't even have my file and he had already
6 told me testimony that Amanda had given him that he told me
7 that Mr. Walutes had given him. That's how I knew what was
8 going on.

9 THE COURT: Well, that's his job.

10 THE DEFENDANT: I understand, but for him to tell
11 him something, he would have had to offer him something. I
12 know Mr. Walutes isn't Santa Claus, he is not going to just
13 give him information freely before the indictment even came.
14 But I just want e-mails regarding me between them.

15 THE COURT: All right. Let me-- The name of the
16 alleged person in the cab who evidently was a witness, was
17 this person a witness to the crime?

18 THE DEFENDANT: No. The story changed. Originally
19 the guy says he came back to his car, he found the keys that
20 were thrown in the bushes, 3 o'clock in the morning. God
21 knows how long, if this had occurred, how long that would take
22 to find keys that were thrown in the bushes at 3 in the
23 morning. He grabbed the keys, came back to court.

24 In the original report he said he went to a friend's
25 apartment in the complex, but then he came to trial and said,

1 you know, this dramatic scene where he runs out into the
2 street and waving and this guy comes and picks him up. I feel
3 like this person is actually someone he knows in that
4 complex--

5 THE COURT: So, you want to know the name of the
6 friend who picked him up after the robbery?

7 THE DEFENDANT: To get the particulars of what
8 occurred afterwards because I feel like there is a conflict as
9 in the time.

10 THE COURT: All right. Who is Portillo and why do
11 you want his call?

12 THE DEFENDANT: He is the informant's cousin. And
13 while Mr. Portillo was incarcerated, Mr. Bryan had went home.
14 In lieu of his help to law enforcement, they gave him a
15 reprieve and didn't let him go to the D.C. for the time he was
16 supposed to serve there. While he went home, what he did was
17 he went and broke into another one of their cousin's homes to
18 retrieve a firearm and other items, which Mr. Portillo told me
19 during a conversation in jail. And what I did was I asked
20 him, so, when did you find this out? And he was like, oh,
21 when I got home I talked to the other cousin.

22 And I was, oh, you talked to him over your phone?
23 He was like, yeah. And I said, did you use your inmate
24 account? He said yes.

25 So, I want this. And we have already had an

1 investigator go talk to him which corroborated everything that
2 I said. And just in case he changes his story, if the
3 Government goes and intimidates him like they have done other
4 witnesses, I just want to have that as proof that this
5 incident did occur.

6 THE COURT: Okay. Let's go to Kimberly Riley's
7 records of arrest and convictions.

8 THE DEFENDANT: Well, she is a self-proclaimed
9 prostitute. I can imagine if she is in that--

10 THE COURT: The Government is required to produce
11 her record.

12 THE DEFENDANT: But I just wanted to kind of--
13 Because I know this, I am familiar with this individual. And
14 how I know this individual is going to come up, but it wasn't
15 under the context of me calling her for any prostitution acts
16 or paying her for prostitution acts. I have never had sex
17 with this individual. So, I know of this individual because
18 of another incident that will be, you know, portrayed in
19 court, hopefully.

20 THE COURT: All right. We have discussed the calls.
21 Number 26 is the--

22 THE DEFENDANT: These are calls from Fairfax that
23 are missing. There is a couple calls that are missing where I
24 called Mr. Brown on three-way before I hired him--

25 THE COURT: We have already gone through the calls.

1 THE DEFENDANT: Okay. What is the stance on the
2 calls? I mean, are we waiting until I get the subpoena and
3 prove that these calls are missing or what?

4 THE COURT: I am going to talk about that in a
5 second.

6 THE DEFENDANT: Okay.

7 THE COURT: So, you have had letters seized from you
8 from January of 2010?

9 THE DEFENDANT: Yes.

10 THE COURT: Number 26.

11 THE DEFENDANT: When the Court on 1/7, I think it
12 was 1/7, when you allowed me to go back to Alexandria, all of
13 my stuff was pilfered.

14 As you can see how I keep my notes, I had all of my
15 trial strategies and stuff inside note pads. And when I
16 received them back a day later, they were all ripped out. And
17 just a lot of stuff had happened.

18 And on the phone call in the second visitation, I
19 clearly told the informant, I said, look, if you change up on
20 me, I am just going to use your notes. Because a lot of the
21 dialog that we had, I was on lock-down after the suicide
22 attempt. And what he would do, 4G and 4AB aren't connected
23 together. They specifically put me there so he could come
24 talk to me.

25 But the deputy which I would like to call as a

1 witness can prove that he was at my door-- Because I never
2 spoke to him while I was out. The whole time I was out, I was
3 on the phone, which the phone calls can prove. While I was on
4 punitive, you are only allowed a certain amount of time out.
5 And I can support that with the calls that I made. And all
6 the dialog was made through letters. And I kept those
7 letters.

8 And in that phone call that they are not giving me
9 from the visitation where they are just providing the inside,
10 I basically-- Without revealing too much, these letters were
11 missing from the stuff that I received back. Not only were
12 these letters missing, there is request forms where I had a
13 lot of Sixth Amendment violations where I had dialog with the
14 staff. And some of the staff were able to, were communicating
15 with me and letting me know-- Like, for example, when I
16 wasn't allowed to speak to any attorneys, I was constantly, I
17 have always kept a paper trail with all this stuff, I have got
18 stacks and stacks of stuff.

19 THE COURT: All right, we will request the
20 Alexandria Jail look for any --

21 THE DEFENDANT: Compel the letters.

22 THE COURT: -- letters that you have. I don't need
23 argument on the remainder. The Government is required to give
24 up any information which is favorable to you which they have
25 in their possession, and they have agreed to do that. I don't

1 know if there has been an exchange of that material. But to
2 the extent they have material that is favorable to you, they
3 are required to produce it, and they will produce it.

4 THE DEFENDANT: I just identified the operating
5 procedures because I've seen other cases where people had to
6 make diligence. The only reason I ask that is because Mr.
7 Hickman came on the stand and made that whole situation where,
8 oh, he made a camera recording of one witness but didn't make
9 it of the other one. That is not his normal procedures.

10 So, that's going to be a very difficult individual
11 to cross-examine when they are just going to say anything.
12 So, I wanted these procedures and stuff so I could basically,
13 you know, refute some of the nonsense that they are going to
14 say.

15 Especially with this, with the little murder for
16 hire operation. And I will get the standard operating
17 procedures for that, so I will be able to cross-examine Mr.
18 Castro. And I feel like that's a very necessary item that I
19 need to help me cross-examine.

20 THE COURT: Okay.

21 THE DEFENDANT: In regards to all statements with
22 Alexandria, Fairfax, all the other-- I added the FBI and CIA
23 to be funny, I apologize. But for Alexandria/Fairfax
24 specifically, there is conversations that I have had with a
25 Fairfax police officer, for example. There is a deputy there

1 that I was cooperating with and giving information to in
2 regards to a lot of stuff who was aware of my conversations
3 with individuals that were involved in the escort stuff where
4 Mr. Walutes claimed that I am running this prostitution ring
5 from jail. But anyway, that's another story.

6 But these individuals have conversations that I have
7 had. And in the course of that, I was able to give
8 information on a murder suspect, information that I was able
9 to obtain communicating with these individuals. And I
10 provided that to Detective Bond, the Fairfax County police
11 officer. And immediately a couple days after they were able
12 to obtain it. Unlike the Government's stance where they go
13 and create crimes, I was able to help them on a situation that
14 actually occurred and was actually a real crime.

15 THE COURT: What detectives did you talk to in
16 Fairfax?

17 MR. NACHMANOFF: Detective Robert Bond.

18 THE COURT: Bond?

19 THE DEFENDANT: Yes, sir. And that's going to be
20 another factor in my defense when--

21 THE COURT: Do you have want any notes--

22 THE DEFENDANT: Any conversations that I have had
23 with any law enforcement that they have on me regarding their
24 files and stuff.

25 THE COURT: All right. Let's hear from Mr. Walutes

1 or Mr. Ben'Ary on the additional discovery requests.

2 MR. BEN'ARY: Your Honor, as an initial response, I
3 would simply say that we are aware of our discovery
4 obligations under the rules and under the United States
5 Constitution and have complied.

6 There are records that the defendant requests that
7 are not in our control and custody, such as third-party--

8 THE COURT: So, you don't have the Sprint bills from
9 Riley or the phone bills from Amanda or voicemails or --

10 MR. BEN'ARY: Surveillance videos.

11 THE COURT: -- bank statements. If I recall
12 correctly, there was some investigation done to determine
13 whether there were surveillance videos taken of the area
14 around where the robbery of Ms. Riley allegedly occurred, and
15 there weren't any recovered, do I recall that correctly?

16 MR. BEN'ARY: That is correct.

17 THE COURT: All right.

18 MR. BEN'ARY: There was a latent fingerprint, we
19 have provided this to defense counsel, a latent fingerprint
20 recovered from the gun. And that was raised somewhere in this
21 list. While our information is that it is not a usable print
22 for identification purposes, we are going to I think get it
23 this afternoon. We have an official from D.C. bringing it
24 over, and we will provide it.

25 THE COURT: All right.

1 MR. BEN'ARY: I kind of don't know exactly which
2 ones Your Honor would like me to address.

3 THE COURT: Well, the 911 call in D.C., that's been
4 provided, is that right?

5 MR. BEN'ARY: For the June incident outside of
6 Ozio's has been.

7 THE COURT: It's not the original 911 call? It's
8 coming off a compilation disk, or is it the original, do you
9 know?

10 MR. BEN'ARY: I think it's the original recording.

11 MR. WALUTES: Your Honor, I practiced there for
12 15 years. I had the U.S. Attorney's Office in D.C., it's all
13 digital, but they e-mailed all the 911s and the police radio
14 runs and I gave all those to defense counsel.

15 THE COURT: All right.

16 MR. WALUTES: Your Honor, also, I am not sure the
17 Court is clear on this, but when the defendant was-- And I
18 apologize, I don't mean the Court to have two Government
19 attorneys arguing--

20 THE COURT: No, that's fine.

21 MR. WALUTES: But when he was talking, he spoke
22 really to two different 911 calls. Mr. Ben'ary has just
23 answered the Court of the 6/12 911 relating to the 404(b)
24 motion this morning. But the other 911 call which will be
25 admitted into evidence by the Government, assuming the Court

1 finds it admissible, is the 911 call that Mr. Haile, the
2 taxicab driver, placed.

3 And on that call, obviously, the defendant has
4 listened to it, the operator says to Mr. Haile, is he black,
5 the person who robbed the taxicab. And he says, he's from
6 Afghanistan.

7 So, I mean, the tape we will listen to, but, Your
8 Honor, I think it's being inaccurately described by the
9 defendant.

10 The point the Government makes is it is the operator
11 from Alexandria who interjected the race, which was in error.
12 The victim actually on the tape says, Afghani.

13 THE COURT: All right.

14 MR. NACHMANOFF: Your Honor, not to make things any
15 more confusing, but I just want to be clear. The only other
16 911 call I wanted to make it clear on would be any 911 call
17 from D.C. on May 27. And my understanding is that there is no
18 record of such a 911 call which would have been placed by
19 Kimberly Riley to the police department, is that correct? I
20 just want to make sure.

21 MR. WALUTES: When they gave me their disclosure,
22 I-- Ms. Riley testified in the grand jury that she had placed
23 a 911 call in D.C. I, using my same sections, asked them to
24 search their records. They have no 911 call for Ms. Riley. I
25 don't know whether the answer there is that she stopped-- The

1 testimony says that D.C. would not respond to her call for
2 assistance.

3 It's not clear to me whether she has-- What she did
4 was call the District. Those would not be recorded. Or if
5 she stopped a police officer in DuPont Circle, those obviously
6 wouldn't be recorded. But there is no 911, and I have written
7 that in the disclosure letter and given that in writing to Mr.
8 Nachmanoff.

9 THE COURT: All right, thank you. The records which
10 would include notes that Mr. Mohamadi made while he was in
11 Alexandria and any letters that he has written to Amanda, Mr.
12 Mohamadi says he got an incomplete version. Have you
13 requested at all information coming from Mr. Mohamadi? And
14 what is your response?

15 MR. WALUTES: Your Honor, I frankly have stayed out
16 of that. I am not sure that those aren't Sixth Amendment
17 privileged communications. So, I have never seen these
18 articles that Mr. Mohamadi is discussing with the Court today.
19 I don't think, appropriately, I should see it.

20 I am aware and I have made current defense counsel,
21 I can't recall in my mind today whether that was Mr. Salvato
22 or Mr. Nachmanoff, but I am aware that there were times where
23 he was being moved from one jail to the other and the jail
24 officials were very displeased to see him in possession of
25 surveillance photographs generated inside the institution.

1 They thought that that compromised their ability to securely
2 run the institution.

3 Apparently Mr. Salvato provided to Mr. Mohamadi the
4 discovery that was given to Mr. Salvato. I told the Marshals
5 that I believed that material was properly generated in
6 discovery and it should not be kept from the defendant.

7 So, it is my hope that it was all returned to the
8 defendant. Frankly, I think that that should be worked
9 between Mr. Nachmanoff and the Marshals. I would prefer not
10 to ever have that material show up on my desk because I have a
11 different concern with that.

12 As to the other point the Court just raised--

13 THE COURT: Amanda's letters.

14 MR. WALUTES: Oh. I personally copied those, Your
15 Honor. So, if there is an error-- I think I copied them
16 accurately. I know he has just told the Court that he always
17 places page numbers on it, but my recollection is there are
18 not page numbers on everything. It looked to me like there
19 was a shortage of paper, he is trying to jam things onto pages
20 and scraps of paper.

21 In any case, I believe I made an accurate, as an
22 officer of the Court I am telling you I believe I made an
23 accurate copy. The originals of the letters are available for
24 the defense counsel, any defense counsel to look at. As they
25 are, obviously, under Rule 16. I am compelled and have no

1 problem with showing them.

2 They look garbled to me as well, Your Honor. I
3 think Mr. Mohamadi accurately describes that. It should be
4 clear, I asked Ms. Inge for all letters that he had ever given
5 to her. It is only what she happened to have, often without
6 an envelope and not kept in any order.

7 So, it isn't that the Government shuffled the
8 evidence. It was presented to us in the condition it's in.
9 And if my recollection serves me correct, there isn't a page
10 number on all of them. Sometimes there is, sometimes there
11 isn't.

12 THE COURT: All right. Well, Mr. Mohamadi, I have
13 looked at the discovery, additional discovery matters that you
14 have requested. We have heard in more detail from the
15 Government what they have, what they don't have, what's been
16 produced, and what hasn't been produced, and explanation of
17 why.

18 The Government has represented that it has complied
19 with its discovery obligations. A lot of the materials that
20 you seek are not within the control of the Government, and
21 they are under no obligation to go search for them.

22 They clearly have searched for many of the items you
23 believe would be relevant to your defense because they also
24 would be relevant to the prosecution, such as looking for
25 surveillance videos and 911 calls and corroboration of the

1 weapon found on June 12 being yours. And I am sure to their
2 displeasure they didn't exist as support for the prosecution
3 and they don't exist for your purposes as well.

4 So, I don't find any of the materials that you seek
5 not being, either having been produced or produced in the form
6 that was, in which it was presented to the Government and
7 otherwise that the Government is obligated.

8 So, without additional information, as in you get
9 corroboration that the Government is wrong and that the police
10 department has got materials--

11 THE DEFENDANT: I have that evidence for you, Your
12 Honor.

13 THE COURT: Then we will revisit it, but that's
14 where we are at this time.

15 THE DEFENDANT: Can I move--

16 THE COURT: I didn't ask-- Let me, before I forget,
17 Officer Bond from Fairfax, do you have--

18 MR. WALUTES: I've never heard of that name before,
19 Your Honor. I will, after we leave today, I appreciate that
20 through the Court the Court got the name, I will see if I can
21 obtain such information. It is unknown to me.

22 I should also say, Your Honor, I don't mean to have
23 Mr. Ben'Ary, who has been graciously assisting me in the last
24 stuff, but some of this historical, and I don't mean to have
25 him-- I took the defendant's motion with those dates from

1 Alexandria and sent it by a PDF file over to the Alexandria
2 Jail and asked them to double-check those dates.

3 After a couple hours they got back to me and said,
4 it does not exist. Obviously, the parties are free to explain
5 that.

6 Mr. Burnham, Deputy Burnham, to the extent defense
7 counsel or the defendant believes there is some animosity or
8 some other bias, he is going to be a Government witness. And
9 so, they are free to obviously in testimony, as the Court has
10 observed, to make whatever concerns known to the jury through
11 that witness. They will have him under oath when they examine
12 him.

13 THE DEFENDANT: You see, the issue with that is I am
14 not going to get any thrills off catching him in a lie. I
15 want this evidence to present. And from my understanding, it
16 is the prosecutors's fundamental right to seek truth, not just
17 to seek a prosecution. And that's just, maybe I am
18 misguided--

19 THE COURT: That's true.

20 THE DEFENDANT: So, I just figured, you know, the
21 fact that he is not practicing diligence in going after
22 concrete conclusive evidence is just, you know, bothersome.
23 And me being in the position that I am, I am not able to, you
24 know, take any initiative because of my alleged actions.

25 So, I am left at a position where my hands are tied.

1 And I feel like it is violating my Constitutional rights to
2 present a full defense, which is, you know, the Constitution
3 has prescribed and the Supreme Court--

4 THE COURT: I understand. I read your pleading and
5 I read it carefully.

6 THE DEFENDANT: So, if they just turned the eye the
7 other way, I mean, where does that leave me?

8 THE COURT: Well, that's not what is being said.

9 THE DEFENDANT: But if I am giving them the specific
10 items, I just at least ask to at least make some type of
11 effort into obtaining this. They are just refusing--

12 THE COURT: I think you just heard that as soon as
13 they got the specific dates in your discovery response, they
14 sent it to the Alexandria Sheriff's Department and said, Mr.
15 Mohamadi says these records are missing, go check again. And
16 they did. So--

17 THE DEFENDANT: What about the Sprint phone bill, my
18 Sprint phone bill that was subpoenaed by Detective Hickman?

19 THE COURT: Does the Sprint phone bill exist?

20 MR. WALUTES: Your Honor, I got the request by
21 e-mail from Mr. Nachmanoff last night, and I have forwarded
22 that request to Detective Hickman and asked him to come see me
23 on Monday. I do intend to see if I am perhaps missing
24 something. I know this case was tried once before on Mr.
25 Mohamadi in the state.

1 THE COURT: Right.

2 MR. WALUTES: I mean, obviously, he can get these
3 records himself, Your Honor. But if I have them, and I mean I
4 broadly, I will find them and I will give them to him.

5 I don't believe they exist. I told that to Mr.
6 Nachmanoff in writing yesterday. And I will try to continue
7 to find if they do exist. And if they do, and it wouldn't
8 surprise me in my history, that through further questioning
9 they do, if they do, and I will conduct the further
10 questioning in advance of trial, and if they do, I will give
11 them to the defense counsel promptly.

12 THE COURT: All right. Thank you.

13 All right. Let's talk about the grand jury records.

14 THE DEFENDANT: Your Honor, I am sorry to interrupt.
15 Just about the other stuff, there is a lot of other stuff that
16 is very exculpatory. Like, for example, I mean, am I going to
17 be deprived of it? I don't understand the Court's ruling on
18 all the other stuff. I have listed about 30 items. So--

19 THE COURT: And I will issue an order. I don't
20 think you're entitled to any of the other remaining requests
21 that you have made. And for the reasons why I stated broadly.
22 And I am not going to repeat myself now, but I will put it in
23 writing for you so that you will have a record of it.

24 THE DEFENDANT: Thank you, Your Honor.

25 THE COURT: Yes, sir. The grand jury records, I am

1 going to deny your motion for disclosure of the grand jury
2 selection records and records of the members of the grand
3 jury. There is no evidence here that the grand jury is
4 composed of anything other than a communitywide membership and
5 that any group has been excluded intentionally from being
6 considered for service on the grand jury.

7 The grand jury is a confidential proceeding. The
8 members of the grand jury are, of course, identified, but
9 their privacy rights would extend to not providing their
10 addresses and --

11 THE DEFENDANT: Your Honor, I just--

12 THE COURT: -- contact information. Let me finish
13 and then you can go.

14 If in reviewing the Jencks materials that you
15 receive your counsel believes that there has been an improper
16 attempt to influence the grand jury, then that's something
17 that we will revisit at that time.

18 The grand jury has considered the indictment. They
19 had it in written form. The foreperson of the grand jury
20 signed the indictment back in April '09 and has attested that
21 the evidence, probable cause existed as to each of these
22 counts.

23 So, I will hear you very briefly on that if you want
24 to be heard. I did read your pleading.

25 THE DEFENDANT: And from what I see, there is parts

1 missing out of my pleading. I don't think you received the
2 full motion.

3 But what I would like to assert, and I understand
4 the Court has already made a ruling, is that from my
5 understanding from the cases, I have an unqualified right to
6 be able to inspect these records to be able to file a motion
7 and say, okay, this isn't a fair cross-section under the Jury
8 Selection Services Act. How am I supposed to make that
9 motion, you know what I mean, unless I have-- I don't have
10 that information.

11 And from my understanding is that that has to be
12 provided for a defendant to make that--

13 THE COURT: You have to make a showing that there is
14 some problem.

15 THE DEFENDANT: After, after-- There is no way I
16 can make a showing if I don't know this. It's like I can't
17 tell you what an apple tastes like until I eat an apple.

18 So, I don't understand how I am supposed to say it
19 wasn't a fair cross-section of the community if I have never
20 seen the grand jury or had any idea of who was in the grand
21 jury.

22 THE COURT: All right, I understand your position.

23 All right. We have done the motion to strike the
24 surplusage from the indictment previously. I have looked
25 again at your pleading today asking for much of the same and

1 further support. I am going to deny the motion to strike the
2 surplusage from the indictment, having found previously and
3 finding today that the indictment does not contain surplusage.

4 Is it prejudicial? Yes. Some of the evidence, some
5 of the allegations in the indictment, they are all
6 prejudicial.

7 THE DEFENDANT: Of course. No, my issue was with
8 the continuing factor. He is making a complete Hobbs Act
9 robbery. And the way he has worded it, I think he maybe made
10 a mistake and made it into a conspiracy form where the overt
11 acts are relevant. But in a completed Hobbs Act robbery,
12 overt acts have nothing to do with preparation, planning. All
13 that stuff has no relevance upon what is statutorily
14 prohibited, a robbery that affects interstate commerce.

15 So, in that indictment I was hoping to see the
16 robbery, the acts and how that was constituted and how the
17 interstate commerce was affected. All the other stuff
18 predating that, he basically initiated that whole continuing--

19 THE COURT: Well, if the evidence doesn't conform to
20 the indictment, he is not going to go back--

21 THE DEFENDANT: No. What I am trying to understand,
22 it's like a hybrid. I mean, am I defending against a
23 conspiracy, or am I defending against a completed Hobbs Act
24 robbery?

25 THE COURT: He has identified different overt acts

1 which were a part of the planning and course of the Hobbs Act
2 robbery, which he is entitled to do under the case law.

3 THE DEFENDANT: But from what I have read in the
4 Hobbs Act, and I am not refuting what the Court is saying, and
5 I understand I'm not a lawyer, but what I have read is that
6 there is different requirements for each different type of
7 Hobbs Act. Just like there is a different requirement for
8 distribution compared to a conspiracy to distribute.

9 THE COURT: You are mixing up requirements versus
10 what may be offered in evidence as furtherance of a crime--

11 THE DEFENDANT: Statutory elements though. Just
12 like, my issue is with the Hobbs Act. It is a very
13 complicated matter. And what I feel like the prosecution is
14 doing he is basically putting together all the different types
15 of Hobbs Act requirements. There are set requirements for
16 each different offense. They are all unique in their own
17 ways.

18 And what this indictment on that one offense-- The
19 one with Haile is correctly placed, that's why I didn't
20 challenge that. My challenge is against Count 2 where he
21 starts it off with this continuing stuff.

22 And from what I've read, and I don't have it on
23 hand, but I have a ton of Hobbs Act cases where they clearly
24 separate the qualifications and what is required of all the
25 different allegations of a Hobbs Act, there it's conspiracy to

1 commit Hobbs Act. There is attempt. There is, you know,
2 extortion. They are all varied and they have their own set of
3 requirements.

4 Now, my problem is, by him making that into a
5 continuing factor, he is basically combining two different
6 types of offenses. That, basically, you know, confuses my
7 defense. What am I defending against?

8 I am not questioning the Court, but I just wish the
9 Court would kind of look into that because this is a very
10 disputed issue among the districts.

11 THE COURT: You can be sure that your counsel will
12 be looking at it too because the Hobbs Act is a complex
13 statute, just like the Racketeering Act statute.

14 And there are-- You know, on the one hand the
15 Government is allowed to try and prove the offense in multiple
16 ways, but the jury has to unanimously find that the elements,
17 each of the elements--

18 THE DEFENDANT: But these are two different charges,
19 Your Honor.

20 THE COURT: There are multiple counts.

21 THE DEFENDANT: No, I mean, just in that one
22 indictment, that one allegation, there is two different
23 charges being alleged on that one--

24 THE COURT: I understand that.

25 THE DEFENDANT: It is a conspiracy and a robbery

1 being charged in that event.

2 THE COURT: I have looked at it.

3 THE DEFENDANT: I understand.

4 THE COURT: And I have worked with the statute many
5 times, and I find that it has been properly pled.

6 THE DEFENDANT: I understand.

7 THE COURT: And overt and general allegations are
8 part and parcel to the 1951 charge.

9 So, your exception is noted. All these are now on
10 record and your exception is noted. To the extent I don't
11 grant your motions, the matter is preserved for review by an
12 appellate court.

13 THE DEFENDANT: I'm supposed to hold my breath and
14 hope something happens on appeal?

15 THE COURT: Well--

16 THE DEFENDANT: I'm not looking for a technicality
17 to weasel out of a conviction. I just want a fair trial. And
18 just, you know, I just want a proper trial. But I am not
19 going to question the Court's decision. I respect the Court's
20 decision.

21 THE COURT: Okay. We have discussed the motion for
22 the wiretap evidence. I think the response makes it pretty
23 clear that this is not classic Title 3 evidence.

24 THE DEFENDANT: Why isn't it not?

25 THE COURT: It's taped conversations of criminal

1 activity which the Government is not required to go through
2 the formality of requesting a wiretap under Title 3 of the
3 Surveillance Act.

4 THE DEFENDANT: So, what is the whole purpose of
5 2518 with the requirements?

6 THE COURT: Well, we can have a discussion about
7 that--

8 THE DEFENDANT: I'm sorry. I just thought they
9 would have to go to a Magistrate Judge and offer, from the
10 cases that I have, that they would have to offer-- And it
11 says that Title 3 does apply to inmates.

12 THE COURT: Yeah, but these are consensual
13 recordings of telephone calls that you initiated or received,
14 and--

15 THE DEFENDANT: I am referring to the wire stuff
16 too, the oral interception also.

17 THE COURT: By the informant being wired up?

18 THE DEFENDANT: Yes.

19 THE COURT: And again, the Wiretap Act doesn't cover
20 it.

21 THE DEFENDANT: Okay.

22 THE COURT: But your exception is noted. I think
23 that's all I am going to hear argument on. If there is one
24 highlighted topic you haven't covered in your pleadings that
25 you want me to be aware of--

1 THE DEFENDANT: We haven't addressed the destruction
2 of evidence.

3 THE COURT: Yeah. I don't find there has been any
4 destruction of evidence. I can see that from the record. I
5 don't need anything further.

6 THE DEFENDANT: There is evidence of a piece of
7 paper that is being offered into evidence. There is no way I
8 can prove that that paper wasn't left by a different pen
9 writing. They didn't do any type of tests confirming that
10 that pen was used.

11 THE COURT: They did do an affirmative test. They
12 checked it for fingerprints.

13 THE DEFENDANT: No. What I am referring to is the
14 document that has the number on it, and they claimed, the
15 suspect claims that that pen was used to write something down.
16 And now they are offering that document that was found in the
17 bottom of the cab as proof as to, okay, this is what the
18 suspect wrote on.

19 My whole argument is I can't prove or disprove if
20 that was written by that pen because they never even checked
21 if that pen was the same ink color as that document. They
22 never checked if it was the same type of ink. They didn't
23 conduct any type of test to preserve that fact, but they are
24 offering this document into evidence.

25 THE COURT: Well, the pen and the document are

1 different exhibits, number one.

2 THE DEFENDANT: But they are tied in together.

3 THE COURT: They attempted to find evidence that you
4 had used the pen. They were unable to do so. And whether the
5 pen should have been thrown out at that stage is debatable,
6 but it wasn't done at the behest of the Government. They
7 weren't trying to make sure you couldn't look at the pen. It
8 was destroyed in the course of the forensic examination that
9 was done, and so you can't attribute intentional obstruction
10 under those facts.

11 THE DEFENDANT: The Fourth Circuit held that, in
12 Elliott they held that the fact that they didn't follow
13 procedures is bad faith by itself. And like I gave the
14 example, this is tied together, the note and the pen. There
15 is no, I don't understand why they would throw away the pen
16 when that pen ties it, but--

17 THE COURT: All right. Your record is preserved on
18 that as well. All right.

19 THE DEFENDANT: One last, DuBo, the defective
20 indictment where they don't allege the mens rea.

21 THE COURT: They have sufficiently pled the acts
22 that were committed under the statute in a notice pleading as
23 is allowed under the federal laws. They are going to have to
24 prove the elements of the offense in trial.

25 THE DEFENDANT: I understand.

1 THE COURT: And intent is an element that clearly
2 has to be, specific intent they are going to have to--

3 THE DEFENDANT: So, why is knowingly used when
4 alleging offenses under the statutes? I figured that was an
5 important element of something that needs to be established.
6 And I didn't quote the cases that I have, but I found a ton of
7 cases where that is a fatal error if it is presented to the
8 Court prior to trial.

9 THE COURT: Well, they have in each of these counts
10 alleged that you intentionally, knowingly acted in either
11 committing a robbery by means of a firearm through force,
12 violence and fear of injury. These are all intentional acts.
13 And so, they have alleged properly that you have done these
14 acts intentionally and knowingly. The acts themselves are
15 specifically laid out in the violation.

16 So, they have complied with their statutory
17 requirement for purposes of the indictment.

18 THE DEFENDANT: So, why was DuBo reversed then? I
19 am just curious.

20 THE COURT: Well, because it didn't sufficiently
21 plead the elements of the offense. But that's not the case
22 here.

23 THE DEFENDANT: Okay.

24 THE COURT: All right. All right, Mr. Nachmanoff,
25 anything else in morning?

1 MR. NACHMANOFF: No. Thank you, Your Honor.

2 THE COURT: All right. Then we will await any
3 further pleadings. And we will look to get them on Monday in
4 time so perhaps we can deal with them on Monday. You will
5 continue to get discovery. Mr. Walutes is going to check with
6 Detective Hickman and Detective Bond, see whether there is any
7 other evidence that needs to be produced. And we will go from
8 there.

9 All right. Anything else, Mr. Walutes?

10 MR. WALUTES: No, Your Honor.

11 THE COURT: All right. Thank you all. Well, there
12 is one matter. Have a seat.

13 The behavior issue. You have done very well today.
14 You are a bright guy. You have on occasion gotten frustrated.
15 And you are not frustrated today because I think you have had
16 an opportunity to be involved in the proceeding. I think
17 things are going as well as they could given the fact that you
18 are charged with a bunch of serious charges and the positions
19 you have taken.

20 We are going to select a jury on Wednesday, it is
21 going to take a couple hours. I will be asking a lot of
22 questions. And then you are going to be confronted with
23 witnesses who are going to accuse you of things that you have
24 denied and certainly you don't want to hear.

25 The way you behave is important to you, important to

1 how this jury receives you. That you don't act out when you
2 are upset about something being said against you. And, of
3 course, I am required to conduct a trial in an orderly fashion
4 and make sure that disruptions in the trial don't occur so
5 that the evidence can't be brought to the jury for their
6 consideration.

7 Now, I have had, you know, we have had this
8 conversation before, and there have been times when you were
9 upset. As I said, there are different things that can be done
10 that is allowed, that Courts are allowed to do. They are
11 allowed to, you know, gag you or tie you up. I mean, those
12 are all case law. That's not something that I would do.

13 There are more modern ways of allowing a proceeding
14 to continue in a nondisruptive fashion. One is to exclude you
15 from the courtroom and have you watch the proceeding from down
16 in a holding cell. And this courtroom is set up for that.

17 Another one, and, frankly, I have been requested, is
18 to put a stun belt on you. And that's been used several times
19 in the last several years. It's a pretty extreme--

20 THE DEFENDANT: Get a stun belt put on me?

21 THE COURT: It's a belt that goes around your waist.
22 And if you attempted--

23 THE DEFENDANT: So, I am getting one during trial?

24 THE COURT: No, you're not.

25 THE DEFENDANT: Oh, I'm sorry.

1 THE COURT: You're not getting one to start trial.
2 But if I get information where I am concerned about the safety
3 of the people around you, then it's an option. And I want you
4 to know about it in advance. It's something that I, it's a
5 last resort as far as I am concerned, but it is out there.
6 And I wanted you to know it now so you could think about the
7 behavior aspect of the trial.

8 THE DEFENDANT: Contrary to the allegations, and I
9 know it's a major concern with all the stuff that is being
10 presented against me, but I just want the Court to know that I
11 do have some level of integrity and I don't plan on debasing
12 myself in any form or fashion.

13 THE COURT: And I believe you. You know, it's just
14 going to be a control issue when you are in actual trial and
15 things are--

16 THE DEFENDANT: I already know I am going to get
17 convicted. I just want to put up a good fight. I'm not, I'm
18 not really concerned-- I mean, the way it looks, he is
19 getting everything, he has got a blank check, he can do
20 everything he wants, he can create evidence.

21 So, I am already resolved to the fact that I am
22 going to be convicted, and I am just going to have to hold my
23 breath and wait for an appeal.

24 But I just want the Court to know, you don't have to
25 worry about any problems, I am not going to be surprised by

1 anything. I already know what to expect, Your Honor, and I
2 promise you that I won't--

3 THE COURT: Well, you may be surprised by the way
4 the trial goes in a more positive fashion.

5 THE DEFENDANT: I hope so, Your Honor. I can only
6 hope.

7 THE COURT: All right. Then we are in recess, and I
8 will be in touch with you on Monday when we look at these
9 additional motions.

10 THE DEFENDANT: Thank you for allowing me to write
11 those motions.

12 THE COURT: Yes, sir.

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14 HEARING CONCLUDED

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20 I certify that the foregoing is a true and
21 accurate transcription of my stenographic notes.

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25

/s/ Norman B. Linnell
Norman B. Linnell, RPR, CM, VCE, FCRR